DOCUMENT RESUME

ED 349 250 SO 022 489

TITLE	Assault on Liberty: The Record of the Reagan-Bush Courts.
INSTITUTION	People for the American Way, Washington, DC.
PUB DATE	92
NOTE	283p.
AVAILABLE FROM	People for the American Way, 2000 M Street, N.W., Suite 400, Washington, DC 20036.
PUB TYPE	Reports - Descriptive (141)
EDRS PRICE	MF01/PC12 Plus Postage.
DESCRIPTORS	*Civil Liberties; *Constitutional Law; *Court Role; Federal Government; Freedom of Speech; Government Role; *Judges; Law Related Education; *Presidents of the United States; Privacy; Racial Discrimination; Sex Discrimination
IDENTIFIERS	Bill of Rights; *Bush Administration; *Reagan Administration; United States Constitution

ABSTRACT

This report argues that fundamental constitutional liberties have undergone severe changes and continue to be threatened because of the changes in the federal judiciary that have been brought about by Presidents Ronald Reagan and George Bush. This judicial change has been effected through the appointment of judges with two qualities: first, a narrow interpretation of the fundamental liberties guaranteed by the Constitution and the Bill of Rights as well as the laws that guarantee those liberties; and second, a willingness to engage in judicial activism in order to reinterpret those constitutional and statutory provisions in a manner consistent with the narrower views. This report summarizes the impact the Reagan-Bush courts have had on four important individual liberties: the right to privacy; freedom from discrimination; freedom of expression; and freedom of religion. Four appendices presents detailed analyses of the Reagan-Bush record in each of these areas. Recommendations aimed at remedying this shift in the federal judiciary also are presented. (DB)

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A publication of People For the American Way
2000 M Street, NW, Suite 400
Washington, DC 20036
202-467-4999

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Assault on Liberty:
The Record of the Reagan-Bush Courts

Introduction

The last decade has witnessed a dramatic sea-change in the federal judiciary, brought on by two Presidents, Ronald Reagan and George Bush, intent on reshaping Americans' fundamental liberties. The have effected this judicial revolution by appointing judges with two qualities: first, a narrow view of the fundamental liberties guaranteed by the Constitution and the Bill of Rights as well as the laws that give muscle to those guarantees, and second, a willingness to engage in judicial activism in order to reinterpret those constitutional and statutory provisions in a manner consistent with their own views.

These administrations set out to effect change in the courts, and they succeeded. Even more significantly, the far-reaching consequences of their efforts are only now beginning to be felt. The impact on Americans' lives is most keenly felt when citizens find themselves in distress: when Americans are arrested, under suspicion of a crime, or even just in proximity to the commission of a crime, their protection from unwarranted search and seizure is narrower; when they become unexpectedly pregnant, their right to choose is increasingly restricted; when they seek to freely exercise their religion, their rights are limited; when they seek redress for racial, ethnic, gender or age discrimination, their rights are diminished. But the damage to our fundamental rights and liberties goes much farther.

What has changed, and what continues to change with each passing action of the Reagan-Bush judiciary, is every American's claim to the Bill of Rights. A once expansive shield protecting individual liberty from government intrusion is being narrowed to a list of lifeless specificities. The restructuring of government that took place after the Civil War, as embodied in the 14th Amendment, its subsequent legislation and decades of judicial precedent, is now the subject of retrenchment. And where once the courts were the final guarantors of liberty, today they are willing participants in the diminution of liberty.

Ironically, this remarkable rewriting of the Constitution, the Bill of Rights and federal law is being carried out in the name of something it manifestly is not: judicial restraint. While both Presidents maintained that their intent was to find and appoint judges who would enforce the law, not make the law, they have in fact sought out judges who would rewrite the law and reshape it along sharp ideological lines. In the process, judges appointed under the guise of judicial restraint have in fact engaged in a striking measure of judicial activism. Judges appointed on the grounds that they would defer to legislative intent have willfully overridden the plain intent of Congress or allowed the Executive Branch to do so.

This report documents the method and scope of the sharp changes in the federal judiciary that have taken place during the Reagan-Bush era, and the correspondingly severe changes in the substance and nature of Americans' fundamental constitutional liberties that have resulted, and threaten to continue in the future.

I. Packing the Courts

Article Two of the Constitution of the United States grants to the President, with the advice and consent of the Senate, the power to appoint judges to the federal judiciary. For nearly two centuries, Presidents came and went, leaving behind them judges of all political stripes and ideological persuasions. Not until Ronald Reagan and George Bush came to power, has the impact of the President's appointive power on the fundamental rights and liberties of Americans been so carefully wielded and so keenly felt.

Like few, if any of their predecessors, Reagan and Bush have sent the judiciary, in lock step, done one narrow ideological path. By engaging in unprecedented and painstaking investigations and applying rigorous ideological standards, these two Chief Executives enacted nothing short of a judicial revolution.

The numbers alone suggest the scope of the transformation they have wrought. Since President Reagan's inauguration in 1981, he and President Bush have appointed more than half of the 837 District, Appellate and Supreme Court judges. In addition, as of January 1, 1992, President Bush had some 127 vacancies on the federal bench awaiting his nominations. Already, Reagan-Bush appointees are in the majority on the Supreme Court and in nine of the 13 appellate circuits. By 1997, if George Bush is reelected, he and his predecessor will likely have appointed some 90 percent of the federal judiciary.[1]

The Presidents' goal in filling these seats was to change the way the courts interpreted the Constitution and various statutes, discouraging constitutional and statutory interpretations that sustained individual liberties and encouraging narrow and constricted readings of the charter and the law. By any measure they have succeeded.

As a result, just as Presidents Reagan and Bush have put their stamp on the federal bench, they are now in the process of overhauling the spirit and reading of the Constitution. In the last ten years, the Supreme Court has issued sweeping reinterpretations, even reversals, of its own rulings in the areas of religious liberty, freedom of speech, privacy, search-and-seizure, self-incrimination, civil rights and more.

Before assessing the damage, an examination of the Reagan-Bush judicial selection process is in order.

The Reagan Approach

Ronald Reagan's willingness to remold the judiciary in his own political image came as no surprise; it was, after all, a stated aim of the Republican party platform that carried him to the presidency. The platform called for the party nominee to appoint:

> women and men who respect and reflect the values of the American people, and whose judicial philosophy is characterized by the highest regard for protecting the rights of law-abiding citizens ... [and] who respect traditional family values and the sanctity of innocent human life.[2]

As party platform statements go, this one was considerably clearer than most. The reference to law-abiding citizens reflected the party's view that the Warren Court's various criminal-justice rulings had tilted the balance of justice toward the criminal and away from the victim. "Traditional family values" covered a range of conservative social-policy views, including prayer in the schools and opposition to gender and minority anti-discrimination measures. The last phrase, "the sanctity of innocent human life," was an unabashed reference to a single Supreme Court decision, Roe v. Wade, and the platform's plain meaning was that no candidate for the bench without a stated opposition to Roe would clear the Reagan judge-pickers.

Many presidential candidates run away from their party platforms, but Ronald Reagan campaigned proudly on his. "Time and again in recent years," he told audiences on the campaign trail, "we have seen the Supreme Court override public opinion concerning school prayer, forced busing, the treatment of criminals.... There must be new Justices on the Court, women and men who respect and reflect the values and morals of the American majority. I pledge to make such appointments."[3]

Once elected, Ronald Reagan would live up to his pledge.

Narrowing the Pool

Of course, the practice of appointing ideologically sympathetic judges did not begin in 1981. Presidents have always used the appointments process as an opportunity to dole out political patronage or to advance their own policy views. But under the Reagan and Bush administrations the practice of appointing like-minded judges accelerated. The Reagan administration applied rigorous ideological standards to the process of screening potential judicial nominees. In large measure, the result has been predictable: the federal judiciary is more conservative today than it ever has been.

In fact, during this last decade, ideological requirements have so narrowed the pool of potential judges that non-ideological criteria, such as experience and the ability to bring an open mind to the task of judging, suffered. In both Administrations, nominees of dubious qualifications or with records suggesting prejudice have been sent to the Senate for confirmation.

Reagan nominee Jefferson Sessions was withdrawn from Senate consideration in 1986 after he failed to explain to the satisfaction of the Judiciary Committee his previous statements that the NAACP was "unAmerican" and controlled by "Communists." In Senate testimony, Sessions sought without success to explain how, if confirmed to a seat on the bench in Alabama, he could bring an open mind to civil rights cases. Facing likely rejection, his nomination was withdrawn.

That same year, Reagan nominee Daniel Manion had a different problem. His record was absent any meaningful experience in the federal courts, and the briefs he submitted to the Senate as examples of his best work were riddled with spelling and grammatical errors. Manion was rejected by the Committee but confirmed by the full Senate by a single vote amidst bitter charges that senators had traded their confirmation votes for political favors.

Though lacking appropriate qualifications for a lifetime appointment to the federal bench, Sessions and Manion excelled in one area of primary importance to the Reagan judge-pickers: they boasted impeccable ideological credentials.

The Bush administration has had one nominee rejected for his insensitivity to prejudice: Kenneth Ryskamp of Florida. Nominated for a seat on the Eleventh Circuit Court of Appeals, Ryskamp, a sitting district court judge, had a record that suggested serious problems. He belonged, for example, to a racially exclusive country club. Even still, his confirmation seemed likely, until Senators learned of demeaning comments he had made about Hispanic Americans in an interview with Senate investigators. Ryskamp's 1991 nomination was rejected by the Committee on a bipartisan vote.

While these nominations battles earned considerable public attention, as did the higher profile Supreme Court battles of the decade, they were barely the tip of the iceberg. In his tenure, Ronald Reagan named 379 judges, nearly half of all seats by the time he retired. The same process that produced Manion and Sessions, and for that matter, Rehnquist, Scalia and Bork, produced the President's other choices as well.

From the outset of his administration, Ronald Reagan took a different approach to judge-picking. While every president has sought to leave his mark on the federal judiciary, the Reagan team brought more than just determination to the goal; they brought a carefully considered process.

It was a process informed by the experience of Reagan's predecessors. As the role of the courts in America's political context grew more significant in the years since World War II, presidents sought to exert greater control on the courts. Franklin Roosevelt sought to pack the Supreme Court with judges sympathetic to his New Deal policies. Dwight Eisenhower established procedures intended both to "balance" the courts after two decades of Democratic appointments and to improve the general caliber of appointments. Toward that end, Eisenhower first involved the American Bar Association (ABA) in the process by seeking their evaluation of candidates' legal credentials.

John Kennedy and Lyndon Johnson both continued that practice, and both, also like Eisenhower, relied heavily on the practice of "Senatorial courtesy," permitting same-party senators in the home state of a vacant district court judgeship to control the selection process. Both Democrats had mixed results in terms of appointing ideologically sympathetic judges, and Kennedy in particular managed to name judges who would later rule against his civil-rights and civil-liberties positions.

Richard Nixon's appointments were the product of a similar process, and he, too, nominated judges who did not always agree with him. It was, after all, a Nixon appointee who would author Roe v. Wade. Nixon, too had the politically humiliating experience of having two consecutive nominees to the Supreme Court rejected by the Senate. In filling out Nixon's term, Gerald Ford placed no particular emphasis on the judiciary.

Jimmy Carter, on the other hand, promised to open the selection process up to minorities and women, a pledge he kept, for the most part. "If I didn't have to get Senate confirmation of appointees," the President declared, "I could tell you flatly that 12 percent of my appointees would be Black and 3 percent would be Spanish-speaking and 40 percent would be women and so forth."[4] To accomplish his goal, Carter involved many more players outside the government in his process, including the National Bar Association and women's organizations. He also established merit boards that sought out and evaluated potential nominees.

Carter's Attorney General, Judge Griffin Bell, also took the extraordinary step of ordering the FBI to stop reporting the political affiliations of nominees in their background checks, and then named two Republicans to handle initial recommendations from merit boards and from senators. "I have no interest in what party they [the nominees] are in as long as they are good people,"[5] he said. Judge Bell did not meet with prospective nominees, unless it was to discuss concerns raised by the ABA, suggesting that his disinterest in nominees' politics extended to issues as well as to parties. Carter's overall appointment record suggested that Bell's views on party affiliation carried the day within the Administration: seven percent of Democrat Carter's nominees were Republicans.

The Reagan team took a considerably more systematic approach, one admittedly calculated to produce judges of a particular ideological bent. The Reagan appointment strategy had four distinct elements: ideological pre-screening; appointing young conservative judges; preferring academics with a proven conservative track record; and the resolve to reject insufficiently "pure" nominees.

Screening for Ideology

By the administration's own congressional testimony, every candidate for the bench was subjected to a series of interviews with a battery of Justice Department lawyers. Interviews would last, again according to Administration testimony, between 30 minutes and one hour, and prospective nominees would spend some four hours per visit interviewing. Those that survived this winnowing process went on to meet with the Attorney General.

What was covered in these interviews is a matter of some dispute. Reagan administration officials maintained that no candidates were asked how they would rule on specific cases, although even they acknowledge that specific precedents were discussed. Ed Meese:

> I want to assure you that we at the Department aren't interested in whether a prospective judge favors or opposes legalized abortion. We aren't interested in whether or not they personally oppose the death penalty. And we aren't interested in how they may personally feel about affirmative action, school busing or prayer in schools.... [W]e do discuss the law ... [and] engage in a dialogue over the reasoning and merits of particular decisions.[6]

Among the regular topics of discussion in interviews, according to Administration officials, was Roe v. Wade, the very case targeted for reversal by the Republican party platform and the President himself. Grover Rees, the special assistant to the Attorney General for judicial selection, told the Washington Times that candidates are asked "how they view the 1973 Roe v. Wade decision." Indeed, Meese himself acknowledged in 1985 that he was searching for judges who believed in "the sanctity of human life."

According to several judicial nominees rejected by the Administration after this screening process, the questioning was a good deal more specific. According to a 1985 National Public Radio report on Reagan judge-picking:

> Several judicial contenders told NPR they were asked directly about their views on abortion. One female state court judge said she was asked repeatedly how she would rule on an abortion case if it came before her. Another state court judge said her fellow judges were called by Justice Department officials and asked for her views on abortion. One woman corporate lawyer said she, too, was asked about her views on abortion, because, she was told, questions had been raised about her one-time membership in a woman's group that had been formed as the moderate answer to the National Organization for Women.[7]

Said one rejected candidate: "I guess most of us have accepted that we're not going to get these judgeships unless we're willing to commit to a particular position, which we think would be improper."[8]

For those candidates who survived the Justice Department's screening, still another hurdle awaited: a special White House standing committee established to ensure that President Reagan's judicial nominees shared his philosophy. The committee, which met weekly, represented an extraordinary departure from previous administrations, which placed the burden of final selection for district and circuit court nominations largely on the Justice Department.

Development of lists of possible candidates was handled for the Reagan administration by Justice Department staff that, at least in the first term of the Reagan presidency, relied heavily on a merit-panel system. In 1985, Attorney General Edwin Meese sought to appoint Herbert Ellingwood to the crucial staff position riding herd over the judicial-selection process. But just prior to his nomination, Ellingwood's experience as the head of a private "Christian talent bank," whose aim was "flooding the federal bureaucracy with Christians," came to light, and Ellingwood's name was dropped for the post at the insistence of key senators.

In one final departure from previous administrations, the Reagan administration significantly watered down the exercise of senatorial courtesy, asking home-state Republican senators to supply not one but between three and five possible nominees for every vacancy. Republican senators complained to the White House that the policy gave senators considerably less control over the selection of nominees; in fact, that was precisely the point.

Judges for the Next Century

The second element of the Reagan appointment strategy was the selection of young nominees, judges with relatively little experience when appointed but who could be expected to serve on the bench well into the next century. According to the *ABA Journal*:

> Since the enactment of the Circuit Courts of Appeals Act of 1891, no other president, starting with Benjamin Harrison, has appointed appeals court judges with a younger average age than has Ronald Reagan during his second term. And no other president has appointed such a high proportion of appeals court judges under the age of 45 (more than one-third during the second term.)[9]

The Administration's purpose in appointing such judges was apparently two-fold. First, by appointing young judges they could use the federal district and circuit courts as a kind of "farm system" for the Supreme Court. Young nominees in the mid-1980s would still be comparatively young by the time they had several years of judging to their credit. Moreover, their willingness to toe the Reagan ideological line would be clear by then as well. Those with satisfactory records might be ready for eventual elevation to the Supreme Court. That appears to have been the path to the High Court taken by Justice Clarence Thomas, appointed by Bush, to the Circuit Court of Appeals for the District of Columbia and then later, again by Bush, to the Supreme Court.

Indeed, among those appointed by President Reagan are a number of youthful judges whose names are frequently heard in connection with possible Supreme Court vacancies, including 42-year old (at the time of appointment) Richard Posner, 35-year-old Frank Easterbrook, 39-year-old J. Harvie Wilkinson, 36-year-old Kenneth Starr, 34-year-old Alex Kozinski and 36-year-old Edith Jones.

Second, young judges who do not move on to higher courts can nevertheless be expected to serve lengthy, if not life, terms in the seats to which they were appointed, filling the judiciary with conservative judges with decades of service ahead of them. In the words of Texas Republican Senator Phil Gramm, upon recommending a 31-year old candidate to the Administration, the point is that the nominee will "be there for a long time ... making rulings after I'm dead."[10] Fred Fielding, chair of President Reagan's judicial selection committee, agreed. Asked by a reporter "Do you look for particularly young candidates knowing that they've got life tenure?" Fielding minced no words: "Yes, we do," he replied.[11]

From the Academy

A third prong of the Reagan judicial-selection strategy was the reliance on law professors. At least until Robert Bork's nomination to the Supreme Court was rejected by a record vote in the Senate, Reagan judge-pickers regarded academic careers as an advantage because academics' views could be easily gauged. Professors, after all, must publish or perish, and so long as one's expressed written views could be trusted, one's future rulings could be predicted.

Also, in the words of scholar Herman Schwartz, "the Administration's penchant for law professors is not accidental. Academic lawyers are trained to criticize existing law and have less respect for precedent and legal tradition." For an administration bent on reversing decades of jurisprudence, leading academic lights were attractive choices indeed.

Passing the Litmus Test

Finally, the Administration's strategy involved a final element: the willingness to reject candidates, even mainstream Republicans, whose record showed even the slightest chink in their conservative armor. The Reagan record is littered with such instances. One nominee, first in her law school class and highly rated by the ABA, was rejected because she had supported the Equal Rights Amendment, as had the Republican party itself until 1980. Several conservative groups nevertheless charged her falsely with being a closet Democrat, and the White House struck her name from the list of potential candidates.

Another candidate, a former Deputy Solicitor General, was rejected by the Administration's supporters for having made small donations to Planned Parenthood and the National Coalition to Ban Handguns. Thirteen senators demanded his withdrawal, and the President obliged.

Prominent Republican Philip Lacovara, who had been appointed twice by Reagan to serve on the District of Columbia Judicial Nominating Commission, was rejected on the grounds that he was "too liberal" and "not politically reliable."[12] Those decisions were based on his membership in two decidedly establishment organizations, the Washington Lawyers Committee for Civil Rights Under Law and the ABA Section of Individual Rights and Responsibilities. Lacovara wrote a bitter opinion piece that appeared in *The New York Times*, in which he observed that in the past,

> political affiliation has provided a source of recognition, not a litmus test for philosophical orthodoxy. Over time, this pattern has created a Federal judiciary rich in diversity and perspective. Today the message is quite different: ideology is the primary qualification, and it is a candidate's demonstrated orthodoxy that brings his name before the President and ultimately before the Senate. Unique in our nation's history, the current Justice Department has been processing any judicial candidate through a series of officials whose primary duty is to assess the candidate's ideological purity.[13]

William Hellerstein's 1984 candidacy was derailed by no less than Roy Cohn, former counsel to Sen. Joseph McCarthy (R-WI). Objecting to a passing criticism in an article on court congestion about the courts' willingness to imprison citizens convicted of minor drug possession offenses, Cohn called Hellerstein "ultraliberal." The nomination was withdrawn, prompting New York Senator Daniel Patrick Moynihan (D-NY) to attack the White House screening process as an example of "corruption."[14]

Bush in the Reagan Mold

> Reagan did better in judicial-personnel selection than in any other area of the government.... It's just going to take another eight years [to complete the task].
>
> Patrick McGuigan
> Free Congress Foundation[15]

With respect to judicial selection, the Bush presidency has been largely a rerun of his predecessor's. As in 1980 and 1984, standard-bearer Bush ran in 1988 on a platform promising judges opposed to Roe v. Wade. His campaign rhetoric echoed Ronald Reagan's; he promised to appoint judges who would "interpret the law, not legislate from the bench."[16]

Once elected, Bush officials made clear that the new President would follow in the footsteps of his predecessor. Bush "will continue to appoint judges in the Reagan manner,"[17] declared White House Counsel C. Boyden Gray just four days after the President's inauguration. Indeed, in some areas, most particularly White House involvement in the process, the Bush model appears to have fine-tuned the Reagan approach.

Gray took charge of judge-picking from inside the White House, and among his first official actions was the hiring of Lee Liberman to assist him in riding herd over the process. Liberman, a Federalist Society co-founder (Gray, too is a member) promptly began to insert herself in the Justice Department's selection process in a way even no Reagan White House official had previously. According to the *Washington Post*, "Liberman, who worked on judicial selection as an Associate Deputy Attorney General in the Meese Justice Department, has told Justice Department officials and others that she hopes to interview candidates herself and obtain access to the notes of interviews conducted by others. That would be a dramatic departure from the Reagan process, in which the White House retained veto power over nominees but did not directly participate in the screening process."[18]

The conservative editorial pages of the *Wall Street Journal* heaped praise on the Administration's early staff decisions:

> Mr. Gray is building a White House Counsel staff that looks like an all-star team of the Federalist Society, the young conservative lawyers' group. Deputy John Schmitz and Associate Lee Liberman both clerked for Justice Scalia, Nelson Lund clerked for Justice O'connor and Amy Schwartz was a stalwart at the Education Department under William Bennett. They ensure a Federalist voice in judicial selection.[19]

After nearly three and one half years in the Presidency, reviews of George Bush's judicial selection process are in, and, from the perspective of the architects of the Reagan approach, they are equally stellar.

Clint Bolick, Vice President of the right-wing Institute for Justice, describes the Bush appointment record as "a tour de force.... He has been even better than Reagan. Bush has made the judiciary more solidly conservative without spending a lot of political capital on the issue."[20]

Edwin Meese applauds Bush's judge-picking, saying his successors "have done an excellent job.... The results are the same as in the Reagan administration."[21]

A number of Bush's judicial nominations have been every bit as controversial as his predecessor's. Even before charges of sexual harassment threatened the nomination of Justice Clarence Thomas, his road to confirmation was anything but smooth. Persistent questions were raised, and largely unanswered, about his knowledge of case law, and his record of seeming contempt for the law in his official capacities with executive agencies of the Reagan administration. As noted earlier, District Court Judge Kenneth Ryskamp was rejected for a seat on the Circuit Court in the face of charges about his sensitivity to issues of discrimination and prejudice. In addition, serious questions have been raised about a number of subsequent Bush nominations.

Claiming the Tenth Justice

The Reagan and Bush administrations have also transformed the process of constitutional interpretation in America by reshaping the mission of the Solicitor General of the United States. For many years, the Solicitor General has served a dual role: first, functioning as the Administration's chief lawyer before the Supreme Court, and second, serving informally as a guide for Supreme Court Justices to the most pressing cases for review. This latter role prompted Supreme Court Justice Lewis Powell to describe the Solicitor General as the Court's "tenth Justice."[22]

But the Reagan and Bush administrations have emphasized the former role to the detriment of the latter, accenting sharply the political role of the Solicitor General's work to the point that its "independent" function as a servant of the Court has been virtually neglected. In the words of former Supreme Court Justice Thurgood Marshall (also a former Solicitor General), "They can't separate the political from the legal. They write political speeches and put the word 'brief' on them."[23]

Structurally, the Reagan administration began its transformation of the Solicitor General's role by appointing a political deputy to the office to guard the Administration's political interests in the internal debate over legal matters. The office then began churning out *amicus curiae* briefs at an unprecedented rate, and, perhaps more importantly, the nature of those briefs began to change as well. According to *Congressional Quarterly*,

> [T]he Reagan administration, more than any earlier administration, also has been bombarding the court with *amicus curiae* (friend of the court) briefs. These are arguments designed to influence the court in cases that do not directly involve the federal government.... In nearly every instance, Reagan administration amicus briefs have urged the court to narrow its view of individual rights or to restrict the scope of government regulation. In fact, the Justice Department has been pressing the Court to make sweeping policy changes it has been unable to persuade Congress to adopt on issues such as abortion, school prayer, affirmative action and busing.[24]

As an indication of the scope of the politicization of the Solicitor General's role, between 1966 and 1970, just 20 percent of the Solicitor General's briefs were *amicus* briefs. By the middle of the Reagan era, the percentage had more than doubled.

A further indication that the Reagan administration viewed the Solicitor General's office as an extension of its political operation was that, even when the Supreme Court rejected a given argument, the Solicitor General would offer identical reasoning in subsequent cases. In the words of Steven Puro, political science professor at St. Louis University and a student of the Solicitor General's historic role,

> Solicitors General have taken the hint [from a rebuff by the court] and backed off. But there seems to be a very conscious strategy on the part of [the Reagan] administration to press issues despite the court's displeasure. [The Administration seems] now to be filing briefs in order to stand up and be counted on a particular issue.[25]

Puro notes that Reagan *amicus* briefs repeatedly turned up in the pages of newspapers before being filed with the Court, suggesting that briefs were prepared as much, if not more, for public consumption as for the Court's use. Much the same has occurred under the Bush administration, particularly on the issue of abortion.

The Administration's tinkering with the Solicitor General's role became so profound that Rex Lee, the Administration's first Solicitor General, resigned the job, saying he had no desire to serve as the "pamphleteer general."[26]

Weak Response from the Senate

Throughout much of the 1980s, the Executive Branch enjoyed a relatively free hand with respect to judicial nominations — the institution's constitutional obligation to provide advice and consent notwithstanding.

Of the several hundred nominees offered to the U.S. Senate by Presidents Reagan and Bush, only a handful have been rejected. A slightly larger group has met with careful scrutiny, generally after outside organizations brought specific concerns to the attention of the Senate. But in the vast majority of cases, judicial nominees have passed through Senate confirmation proceedings and onto the federal bench without careful scrutiny from the Senate.

For its part, the Senate Judiciary Committee, particularly in the last several years, has worked to establish procedures to better screen nominees. But even as the disturbing impact of the Reagan-Bush campaign to reshape the courts has become increasingly evident, the Senate, with rare exception, has rubberstamped judicial nominations.

The Impact

The result of the Reagan-Bush judicial revolution has been precisely what was intended: a manifest retreat by the courts from their traditional role as defenders of individual liberty. On civil rights, separation of church and state, religious liberty, freedom of speech, reproductive rights, *habeus corpus*, the death penalty and much more, the courts have walked away from some precedents, snuck around others, and overturned some outright.

Justice Thurgood Marshall made that very point in his final dissent from the bench. The Court, wrote the distinguished jurist, is sending a "clear signal that scores of established constitutional liberties are now ripe for reconsideration" as a result of changes in the Court's "personnel." Describing 16 major individual liberties rulings decided by 5-4 margins as "endangered precedents," Marshall concluded that "Power, not reason, is the new currency of this Court's decision-making."[27]

Lost, too, in the Reagan-Bush era has been the progress made by the Carter administration in making the courts more representative of the population at large. While nearly 30 percent of President Carter's judgeships went to women and minorities, as of the end of 1990, barely 16 percent of Reagan-Bush appointees were held by judges from these underrepresented segments of American society.[28]

In the estimation of Senate Judiciary Chair Joseph Biden (D-DE), the revolution of the 1980s was driven by a desire to turn back the clock on American constitutional thought. With the help of Edwin Meese in the Justice Department, he said, the Far Right,

> could, in effect, judicially enact an agenda that they could not get through the Congress. Their ultimate goal is to reverse the moral outcome of the Civil War and to overturn the Civil War constitutional amendments providing for such bothersome protections for human dignity as 'equal protection,' and 'due process.' What troubles the Radical Right in particular is that in enacting these amendments, the people changed the basic character of their Constitution — for the first time, through that Constitution, they explicitly restricted not only the power of the federal government but also the power of the states. The Radical Right means, in fact, to overturn the very Constitutional basis of the modern jurisprudence that protects our basic freedoms.[29]

Among those on the Right with newfound access, James McClellan of the Center for Judicial Studies played a significant role in the period. Throughout the Reagan years and into the Bush administration, the Center lobbied Administration judge-pickers to select conservative nominees, identified prospective nominees to the White House and Justice Department, and fought for confirmation of controversial appointees. In his estimation, "There is no question that this is the most lasting and significant achievement of the Reagan administration. The impact of these appointments will spill over into the next century."[30]

On that point, McClellan and Biden would likely agree.

* * * * * * * * * *

The pages that follow offer a more detailed analysis of the actual impact of the Reagan-Bush courts in four key areas: the right to privacy, freedom from discrimination, freedom of expression and freedom of religion. With respect to each of these areas, the report discusses the governing principles that protected these rights prior to the 1980s and then documents how the decisions of the Reagan-Bush courts over the last decade have fundamentally damaged these important freedoms.

Based on legal research by lawyers at several prominent law firms, the report discusses Supreme Court and lower court decisions rendered through April, 1992. Because lower court judges are bound by precedent, we have included decisions that met one of two criteria: first, cases in which rulings from the Reagan-Bush Supreme Court led to lower court decisions that narrowed individual liberties, and second, cases in which lower courts staffed by Reagan-Bush judges took it upon themselves to restrict liberties even beyond the state of the law at that time. While each of these decisions has itself been harmful, the cumulative impact on Americans' freedoms has been devastating. More judges appointed in the same mold can only worsen the damage in the future.

II. The Reagan-Bush Courts and the Right to Privacy

Americans have always valued highly the right to privacy. Freedom from government intrusion in our homes, freedom from government interference in our personal lives -- the "right to be left alone" -- is perhaps "the most comprehensive of rights and the right most valued" by our society.[31] This fundamental right, however, has been undermined severely by the Reagan-Bush courts.

Until recently, the courts had accorded significant protection to privacy rights. The Supreme Court had ruled that citizens had a fundamental right to privacy as to personal and intimate matters such as family, sex, procreation, and abortion, which could be overridden only by a compelling government interest. Americans were generally protected from physical intrusion or search by government without a search warrant or probable cause of crime or misconduct.

The last ten years, however, have witnessed a direct attack on these principles by the Reagan-Bush courts. The right of choice has been seriously crippled, and may soon be eliminated altogether, so that government could literally require women to carry all pregnancies to term. The courts have sanctioned government intrusion into other sexual privacy matters as well, including arresting consenting adults in their own bedrooms for engaging in homosexual sex. The courts have also authorized significant physical intrusion and search by government, undermining privacy at home, at work, at school, and elsewhere.

Freedom of Choice and Sexual Privacy

In 1973, a seven-justice majority of the Supreme Court, including conservatives like Chief Justice Warren Burger, concluded in Roe v. Wade that a woman's right to choose whether to bear a child was fundamental and that any state restrictions on that right must be strictly scrutinized by the courts. In the years following Roe, the courts consistently struck down attempts to discourage or restrict women from choosing to have abortions. Even as late as 1983, for example, a majority of the Supreme Court rejected attempts to weaken the protection accorded to the right to choose.[32]

As several more justices appointed by President Reagan joined the Court, however, the law changed dramatically. In its 1989 decision in Webster v. Reproductive Health Services, a majority of the justices effectively ruled that the right to choose was no longer fundamental and that restrictions on abortion should be approved even if they are not necessary to promote a compelling government interest. While the majority claimed that it was not (yet) overruling Roe, Roe author Justice Blackmun branded this disclaimer "totally meaningless."[33] One study has found that Reagan-Bush appointees to the bench are more hostile to abortion rights than even judges appointed by President Nixon.[34] The Supreme Court and the lower federal courts have proceeded to approve a number of severe restrictions on abortion rights, such as:

> –banning all abortions at public facilities, including even at private hospitals or clinics which lease space from public agencies, foreclosing the availability of abortions to many women;[35]
>
> –forbidding doctors from performing abortions unless they have surgical privileges at hospitals offering ob/gyn services, even though most abortions are performed at outpatient clinics;[36]
>
> –banning all health insurance policies from covering abortion, except in a separate rider with separate, additional premiums;[37]
>
> –imposing disclosure requirements on abortion providers which, according to a federal district court, would likely produce increased harassment of providers, unjustifiably interfere with the exercise of proper medical judgment, and make it more difficult for poor women to obtain abortions;[38]
>
> –requiring that doctors performing abortions effectively try to discourage them by informing patients about details of fetal development, alternatives to abortion, and entitlement to public aid and child support if a pregnancy is carried to term, despite a federal judge's finding that such a practice may mislead or confuse patients and is generally inappropriate;[39]
>
> –mandating a delay of at least 24 hours before abortions can be performed, even when the delay is unnecessary and medically dangerous and would severely burden the poor, battered women, and working women with limited sick leave.[40]

The Supreme Court has not yet approved all these restrictions. Indeed, several were specifically declared unconstitutional by the Court as recently as 1986.[41] The weak standard announced in Webster led an appellate court to approve many of these restrictions in Planned Parenthood of Southeastern Pa. v. Casey, however, which the high Court is now reviewing. Most observers expect that by this July, the Court will issue its decision, reverse its course 180 degrees, and approve virtually the same abortion restrictions it found illegal only six years ago. Whatever remains of Roe v. Wade after Casey will likely survive only until the Court considers the Louisiana, Guam, or Utah statutes that forbid most abortions altogether. At that point, only state courts and legislative remedies, such as the proposed Freedom of Choice Act, will be able to protect the fundamental right of privacy recognized in Roe v. Wade.

The courts have also begun to undermine the right to sexual privacy as a result of Bowers v. Hardwick. In that case, a narrow 5-4 majority ruled that a state could regulate private sexual matters even to the extent of arresting consenting adults in their own bedroom for engaging in homosexual behavior. The lower courts have relied on Hardwick to sanction widespread job bias and other discrimination against homosexuals. At least one lower court has gone so far as to cite Hardwick in holding that there is no fundamental right of privacy as to heterosexual relations between an unmarried man and woman.[42] Even one of the former justices who was part of the majority in Hardwick has recently acknowledged, after his retirement, that his vote was a mistake -- too late, unfortunately, to remedy the harm that has already been done.[43]

Privacy Against Government Intrusion

Stemming from our nation's bitter experience at the hands of British troops in colonial times, the right of all Americans to be secure in their persons, homes, and property against improper physical intrusion or search by government has been expressly protected by the Constitution and traditionally safeguarded by the courts. Recently. however, the courts have mounted an assault against this right of privacy as well.

Federal judges are curtailing citizens' privacy rights by changing the way they apply our constitutional protections against government intrusion and unreasonable search and seizure. First, they have exempted some intrusions from any significant constitutional scrutiny at all by declaring that citizens have no reasonable expectation of privacy in activities which many would consider quite private indeed. In addition, they have enormously expanded the exceptions to the usual requirement that government must have a search warrant and probable cause to believe wrongdoing has occurred to justify official search and intrusion on individual privacy. In one recent case, the Supreme Court even overruled a decision by former Chief Justice Burger upholding the warrant requirement, based on what the dissenting Justices described as "arguments that conservative judges have repeatedly rejected in past cases."[44]

In fact, the Reagan-Bush courts have ruled over the past decade that, without a warrant or probable cause, the government can violate our privacy through a broad range of conduct, such as:

--spying on a private backyard surrounded by a 10-foot fence, or a partially covered greenhouse, by flying overhead and using cameras or other surveillance methods;[45]

--strip-searching a student at school or searching her purse or locker;[46]

--seizing a private citizen's film brought to a photo store for developing;[47]

--spying on a personal rented storage unit by looking through a hole cut in the ceiling of an adjacent unit;[48]

--requiring mandatory blood and urine drug testing of employees or job applicants, even if no one is suspected of drug use and even for jobs without direct public safety responsibilities;[49]

--boarding a bus, interrogating people without any suspicion of wrongdoing, and asking for identification and to search luggage;[50]

--searching through any employee's desk, office, or file cabinet;[51]

--rifling through anyone's garbage or trash can;[52]

--following a woman into a restroom and watching her through a gap in the door of a bathroom stall.[53]

Ironically, even as Administration rhetoric against communist totalitarianism remained strong, the Reagan-Bush courts began accepting more and more of their tactics in this country. From restrictions on abortion to intrusive surveillance tactics on innocent citizens, government invasion of personal privacy has been sanctioned by the federal courts. Privacy rights of all Americans have been severely eroded by the courts over the past decade, and even more threats can be expected in the future.

III. The Reagan-Bush Courts and Freedom from Discrimination

Equal justice is perhaps the most fundamental principle in a democratic society. It is a principle etched into the Fourteenth Amendment, which promises that all persons will be treated fairly under the law. The guarantee that all Americans are entitled to a "fair shake" no matter what their skin color, gender, or religion is the unifying ideal for a nation that prides itself on its diversity; indeed, it is the glue that bonds the disparate elements of American society into a cohesive whole.

To promote this concept of equality and fairness, Congress has passed laws prohibiting discrimination in various settings. Among them are Title VII and Section 1981 in employment, Title IX in education, and the Voting Rights Act. These statutes are broadly worded to prohibit all methods of discrimination and, until recently, the courts have generally interpreted them faithfully to address the serious problems of discrimination. Thus, the courts have fulfilled their role of applying the laws in order to combat the various and often subtle methods by which discrimination occurs.

Over the last decade, however, the courts have severely damaged America's anti-discrimination laws and constitutional provisions by misinterpreting Congressional enactments and reversing long-standing judicial precedent that gave substance to these provisions. This has occurred through a number of methods. For example, the courts have decided that Section 1981, Title VII, and other statutes all allow certain types of discriminatory behavior -- the very types of behavior that these laws were passed to prohibit. In other instances, the courts have erected a variety of barriers to access to these and other civil rights protections -- barriers so severe that the very victims these provisions were designed to protect are unable to use them. In addition, the courts have seriously restricted the remedies available to bias victims to combat discrimination and its effects.

At the Supreme Court level, the damage done has been so severe that Congress has been forced to enact new legislation to try to counteract the damage. For example, in a series of decisions, the Supreme Court has:

> --ruled that an 1866 law prohibiting race discrimination with respect to employment and other contracts actually permits even blatant bias in firing, promotion, and job conditions. The ruling contradicted the uniform consensus among the federal courts, required the dismissal of hundreds of discrimination claims, and mandated that jury verdicts in favor of bias victims be overturned;[54]
>
> --effectively overruled a unanimous Court opinion by former Chief Justice Burger, which had been consistently followed by lower courts for almost two decades, and ruled that discrimination victims must bear the burden of proving that job practices that have a significant discriminatory impact have no business justification;[55]

> –held that expert-witness costs could not be awarded to successful civil rights plaintiffs despite statutes providing that attorney's fees and costs should be provided to prevailing plaintiffs, even where lower courts find that such costs were necessary for discrimination victims to prevail;[56]
>
> –severely limited a federal law banning gender discrimination in schools receiving federal financial aid so that, for example, a college which got significant federal financial help for students could still legally segregate all its classrooms by gender;[57]
>
> –imposed burdensome deadlines on job-bias victims by ruling that a challenge to a discriminatory seniority system must be brought within a short period of time after the system is instituted, even if the affected employees are not harmed by the system, or even working in the affected part of the company, until years later;[58]
>
> –discouraged settlements in discrimination cases by ruling that consent decrees or settlements can be challenged at any time, even years after they are adopted and implemented, by anyone who claims to be affected, contradicting consistent precedent in the lower courts across the country;[59]
>
> --ruled that it was perfectly legal for a U.S. company to commit even blatant discrimination against a U.S. citizen as long as the discrimination occurred overseas, contrary to the views of the EEOC, the Justice Department, and almost every other federal court that had previously considered the issue.[60]

As a result of the extensive legislative effort that produced the Civil Rights Restoration Act of 1987 and the Civil Rights Act of 1991, Congress was able to repair much, although by no means all, of the damage done by these Supreme Court decisions. Nevertheless, the courts have continued to erode critical civil rights safeguards, often through multiple lower court decisions or rulings on constitutional or other issues that are difficult or impossible for Congress to remedy effectively. As a consequence, all Americans -- white or black, male or female, Jewish or Hispanic -- continue to witness the loss of important civil rights protections. For example, Reagan-Bush courts have:

> –made it difficult or impossible to obtain court orders stopping abusive police tactics in Los Angeles and elsewhere that violate civil rights by ruling that, for instance, even a victim of a police chokehold so severe that he lost consciousness, vomited, and suffered permanent larynx damage when stopped for a routine traffic violation could not seek an injunction against such tactics by the Los Angeles police;[61]
>
> –ruled that no illegal sex harassment had occurred in a case where a female manager was deprived of benefits accorded to male managers, subjected to repeated harassing remarks by a supervisor (such as referring to her or other women as "whores" "cunt" or "fat ass"), and victimized by what a dissenting judge called "anti-female obscenity" and an "abusive, anti-female environment";[62]

--overturned a verdict of $2.5 million awarded by a lower court to several white American males because they had been fired by a Japanese-owned U.S. company due to their national origin, and ruled that such firing of Americans was legal under Title VII;[63]

--disregarded the consistent views of the Justice Department under every President from Nixon through Bush and ruled that Section 5 of the Voting Rights Act did not apply to actions by Alabama county officials to significantly reduce the authority of newly-elected black county officials;[64]

--insulated from challenge a job progression and seniority system that a lower court found had entrenched a series of blatantly discriminatory job practices, including segregated restrooms and assignment of African-American employees to the lowest paying jobs, and held that federal civil rights law allows employers to adopt facially neutral seniority systems even if they have a discriminatory impact on employees;[65]

--decreed that parents of children attending desegregating public schools could not challenge the failure of the IRS to enforce regulations prohibiting the granting of tax exemptions to discriminatory private schools, severely undermining the Supreme Court's ruling in the Bob Jones case that biased schools should not receive such exemptions;[66]

--ruled that an employer was not liable for illegal sex harassment even where a supervisory employee on several occasions had rubbed up against a female employee and fondled her breasts, attempted to force her to engage in oral sex, and pulled down her pants in a restroom and attempted to rape her.[67]

Such rulings are all too typical of the decisions of the federal courts over the past decade on civil rights and discrimination. In fact, one study found that Reagan-Bush judges have upheld race discrimination complaints in only 13% of all cases, compared to 59% for judges appointed by President Carter.[68] Even those few decisions in recent years where the Supreme Court voted by narrow margins to uphold civil rights protections may be in jeopardy in light of the replacement of Justices Brennan and Marshall with more conservative Bush appointees.[69] Although Congress as well as state courts and legislatures will be called upon increasingly to seek to repair the damage, continued severe harm to the right to be free from discrimination can be expected in the future.

IV. The Reagan-Bush Courts and Freedom of Expression

A fundamental premise of all of the rights and freedoms Americans enjoy is the freedom of thought and freedom of expression safeguarded by the First Amendment. Since the early 1980s, however, the courts have severely eroded this important protection. In particular, the courts have damaged free expression rights by imposing speech restrictions on recipients of government funds, by limiting political and artistic expression, and by constricting free expression in the public schools.

Speech Restrictions on Recipients of Government Funds

Until recent judicial decisions, the Supreme Court had firmly upheld the principle that government could not violate freedom of speech by conditioning government funding or other benefits upon foregoing free expression rights. While a person may have no right to a particular government benefit, the Court explained, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially his interest in freedom of speech."[70] Past court decisions had thus generally upheld the speech rights of citizens and organizations receiving government funds and rejected any suggestion that government funding could be conditioned on giving up First Amendment rights.

In Rust v. Sullivan, however, a 5-4 Court majority ruled in 1991 that family planning clinics receiving federal support could be forced by government to choose between their First Amendment rights and federal funding. Specifically, the Court upheld federal "gag rule" regulations forbidding health-care workers in family planning clinics receiving federal funds from counseling or even providing information to women about abortion, even where patients specifically request such information. Indeed, even though many clinics receive as little as 10 percent of their funding from federal sources, they are required to obey the "gag rule" and forced to tell patients, if asked, that they do not consider abortion an "appropriate" method of family planning.[71]

The Bush Justice Department has moved quickly to expand the reach of Rust, arguing that government can impose content restrictions on virtually any recipients of any government funds. If accepted by the courts, such a view would permit severe restrictions on a wide variety of speech, ranging from the removal from a public library of books that a municipality thinks are "politically incorrect" to censoring what university researchers may say about scientific research. As one federal judge has explained, Rust "opened the door to government review and suppression of speech and publication", and the Bush Justice Department position "would take that door off its hinges" by sanctioning "government censorship wherever public funds flow" and posing "an enormous threat to the First Amendment rights of American citizens and to a free society."[72] Several cases are pending now in which the courts have been asked to extend the dangerous ruling in Rust to curb free expression rights.

Constraints on Political and Artistic Expression

Despite the Supreme Court's previous recognition of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," the courts are now significantly limiting expression on political issues.[73] The courts have employed a variety of avenues to achieve this end, such as deciding that a particular form of expression is not "speech" under the First Amendment, that it is not taking place in a "public forum," or that government interests should take precedence over free expression. The result has been a series of decisions approving a wide range of serious limits on political free expression, such as:

> –firing a government employee for circulating a questionnaire about the effect of allegedly harmful office policies on employee morale and about overall work performance, even though the dissent pointed out that the inevitable result would be to "deter public employees from making critical statements about the manner in which government agencies are operated" and to frustrate "an essential function of the First Amendment";[74]
>
> –prohibiting a candidate for public office who seeks the endorsement of more than one political party from even soliciting signatures on a petition to appear on the ballot for more than one party in an election;[75]
>
> --convicting a civilian anti-war protester for simply entering a military base that had been opened to the public for expressive purposes because he had been ordered not to return to the base nine years earlier for destroying less than $100 of government property, a misdemeanor offense, during an anti-Vietnam protest;[76]
>
> –banning the posting of political rally announcements and all other signs on public property, even though "equivalent alternative media" may not be available in some cases, displaying what the dissent called a "startling insensitivity to the principles embodied in the First Amendment";[77]
>
> –excluding public interest advocacy groups like the NAACP Legal Defense Fund and the Natural Resources Defense Council from participating in the Combined Federal Campaign, a government-sponsored forum to solicit charitable contributions from federal employees.[78]

More restrictions on political expression can be expected from the Reagan-Bush courts in the future. Although the Supreme Court has upheld free speech rights in cases such as the recent decisions on flag-burning, those decisions were rendered by narrow 5-4 margins dependent on the votes of Justices Brennan and Marshall, who have been replaced by much more conservative Bush appointments. A number of sitting justices have suggested further restrictions on political expression, such as the opinion of four justices in one recent case indicating that even traditional public forums for free expression like public sidewalks can be closed off by government.[79]

The courts have also limited artistic expression through such decisions as Barnes v. Glen Theatre, Inc., where the Court upheld a state ban on non-obscene nude dancing. As the dissent pointed out, the result was to evade and ignore previous Court decisions and set a dangerous precedent which could lead to serious restrictions on other forms of artistic expression, including even Renaissance nudes in famous art galleries.[80]

Restrictions on Speech in the Public Schools

Perhaps nowhere is the principle of freedom of expression more important than in our public schools, where today's youth learn to become the citizens of tomorrow. While the courts have always acknowledged that speech can be restricted in the schools if it substantially interferes with school operations or the rights of others, the courts have previously rejected the claim that students can be "confined to the expression of those sentiments that are officially approved" or "regarded as closed-circuit recipients of only that which the State chooses to communicate."[81] Instead, the Supreme Court had made clear in upholding the rights of students to wear armbands protesting the Vietnam War, for example, that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[82]

Recently, however, the courts have seriously undermined this principle. In its 1986 decision in Hazelwood School District v. Kuhlmeier, the Supreme Court approved virtually total censorship by school authorities of a high school newspaper, so long as the authorities' decision had some reasonable relationship to some pedagogical concern, despite the fact that school policy provided that free expression would not be restricted. Justices Brennan, Marshall, and Blackmun strongly dissented, explaining that the Court's ruling could effectively grant school officials a "general warrant to act as 'thought police' stifling discussion of all but state-approved topics and advocacy of all but the official position" in the schools.[83]

Since Hazelwood, lower courts have in fact authorized severe restrictions on free expression by students and teachers in the public schools, such as:

> --authorizing the punishment of an honors student, including prohibiting him from running for class president, for giving a campaign speech that criticized the school administration as having an "iron grip" on the school;[84]
>
> --sanctioning a ban on the distribution of copies of a noncurricular newspaper at a high school;[85]

--approving the removal of Lysistrata and Chaucer's The Miller's Tale from the curriculum, despite the court of appeals' expressed doubt as to how students could be harmed by "these masterpieces of Western literature";[86]

--reversing a jury verdict of $50,000 in favor of a discharged teacher and ruling that even though a jury found that he had been fired in part because the school district disapproved of his supplemental world history reading list on ideological or religious grounds, the teacher suffered absolutely no First Amendment injury.[87]

As a direct result of the decisions of the Reagan-Bush courts, free expression rights in the public schools and throughout America have clearly been damaged.

V. The Reagan-Bush Courts and Freedom of Religion

Freedom of religion is a fundamental right of all Americans. As protected by the First Amendment, freedom of religion includes both the right of all individuals to freely exercise their own religion and the assurance that government itself will be neutral on religion and will not promote or denigrate a particular religion or religion generally. The Reagan-Bush courts, however, have seriously undermined these freedoms, threatening the rights of every American.

Free Exercise of Religion

A key protection for freedom of religion has been the established legal principle that government cannot limit or destroy a person's right to practice a religion unless it is necessary to serve a compelling or overriding government interest. Even generally applicable, "neutral" laws, such as the requirement of compulsory public education, have been reviewed and struck down under this standard when they conflict with sincere religious practices or beliefs of individuals.

Particularly over the last ten years, however, the courts have eroded and then virtually abolished this vital protection. In Employment Division v. Smith, Justice Scalia and four other members of the Court ruled that the government is free to apply its generally applicable laws in a way that directly conflicts with or even makes impossible a person's religious practices. As Justice O'Connor explained in disagreeing with Scalia's opinion, the majority's ruling "dramatically departs from well-settled First Amendment jurisprudence" and is "incompatible with our Nation's fundamental commitment to individual religious liberty."[88]

The potential consequences of Smith could be devastating to religious freedom. As religious leaders and others have warned, under Smith the government might be allowed to outlaw circumcision as medically unnecessary, even when practiced for religious reasons by Jews and Moslems; ban all "non-humane" animal slaughter, including that which is necessary for Moslems and Orthodox Jews to eat meat; and outlaw use of all alcoholic beverages, including that used for communion and other religious purposes by Christians and Jews.

The detrimental effects of recent court rulings on religion, however, are much more than hypothetical. Both before and after Smith, the Reagan-Bush courts have harmed religious liberty by authorizing government agencies to:

--require a Jewish Air Force psychologist to remove his yarmulke worn for religious reasons;[89]

--force families of accident victims and others to endure intrusive government autopsies of family members, even though the autopsies are directly contrary to their religious beliefs and there was no finding that the autopsies were necessary for government purposes;[90]

–prevent prison inmates from participating in weekly religious services;[91]

--build a road through and permit "harvesting" of trees from a forest area that was sacred to several American Indian tribes, despite a lower court finding that the result would be to "virtually destroy" the Indians' ability to practice their religion;[92]

–dismiss the challenges of Catholic and Quaker groups to employer sanction provisions of the Immigration Reform and Control Act that they contend have interfered with the operation of their religious facilities;[93]

–enforce boarding house rules that violated the religious practices of the Salvation Army.[94]

Religious leaders and others are attempting to mitigate the harm done by the Reagan-Bush courts to free exercise of religion through the proposed Religious Freedom Restoration Act, which would codify in statutory form the legal principle which the Court overturned in Smith. But for the time being at least, serious -- perhaps irreparable -- damage has been done to the First Amendment's protection of the free exercise of religion.

Separation of Church and State

Another key protection for religious freedom in America has been the separation of church and state -- the principle that government itself remain neutral on religious matters and avoid promoting or denigrating religion. For more than 20 years, the courts have protected this principle by applying the Lemon test, named for the landmark 1971 Supreme Court decision in Lemon v. Kurtzman. Under the Lemon test, government violates religious freedom and neutrality if its conduct is undertaken primarily for religious reasons, has the primary effect of advancing or inhibiting religion, or results in "excessive government entanglement with religion."[95]

Recent court decisions, however, have seriously weakened this important protection. Both the Bush Administration and four Supreme Court justices, including Reagan appointees Scalia and Kennedy, have argued that the Court should abandon the Lemon test and instead employ a much more permissive "coercion" standard. Under the Administration's version of the coercion test, government action would be illegal only if it officially established a particular religion or could be proven to coerce people into participating in particular religious practices.[96]

Adoption of the coercion test could have serious consequences. It could permit prayer in public school classrooms (including even state-chosen sectarian prayer), tuition tax credits to government-selected religious schools, teaching Creationism as science and outlawing evolution in public schools, as well as a variety of other government actions that promote religion and particular religious practices. Lemon could be overruled and the coercion test adopted as early as this year, depending largely on the votes of Bush Supreme Court appointees Thomas and Souter in the pending case of Lee v. Weisman, which concerns the constitutionality of school-sponsored prayer at public high school graduations.

Even without expressly overruling Lemon, the Reagan-Bush courts have already done serious damage to the principle of church-state separation. For example:

> --In a real-life version of the movie "Footloose", an appeals court upheld a Missouri community's ban on dancing, despite the trial court's finding that the purpose of the ban was to put the government's weight behind a fundamentalist religious objection to dancing;[97]
>
> --Another court approved the action of the Illinois House of Representatives in endorsing prayer by converting a hearing room in the State Capitol building into a prayer room;[98]
>
> --Another court explicitly sanctioned the official celebration by Hawaii of Good Friday as a state holiday;[99]
>
> --The Supreme Court approved a teen pregnancy prevention program under which the government provided public funding to religious groups to produce materials that promoted sectarian religious doctrine.[100]

Liberals and conservatives alike have joined in condemning the harm to religious liberty recently created by the courts with respect to free exercise of religion and separation of church and state. Current trends suggest that even more damage may take place in the years to come.

VI. Conclusion and Recommendations

Throughout American history, the courts, and in particular, the federal courts, have been the avenue of final recourse to Americans whose liberties have been infringed by the Executive and Legislative branches. That is precisely what the Framers of the Constitution and Bill of Rights intended: that the Judiciary would function as a check on the majoritarian impulses of the two democratically elected branches. As a result, it has been the courts that have stepped in to strike down laws requiring segregation, the courts that have found unconstitutional laws requiring mandatory prayer in the schools, the courts that have insisted on criminal procedures that protected the constitutional rights of all Americans, and the courts that have protected Americans' fundamental right to privacy. Over the first two centuries of constitutional government, the courts have been far from perfect, but in the main, the federal judiciary has been the last bulwark of constitutional liberty in the United States.

In the last decade, however, the courts have backed away from that role, and the result has been a fraying of the fabric of liberty. As this report documents, that retrenchment has been the result of a calculated strategy conceived and enacted by Presidents Ronald Reagan and George Bush, and their legacy will long outlive their administrations. Although some of the damage may be irreversible, some is not. With that in mind, People For the American Way offers the following recommendations.

Recommendation One: Presidents Must Insist on Fundamental Principles of Justice and Fairness in Selecting Judicial Nominees

For too long, judicial selection by the Executive Branch has been driven by a single factor: the search for ideologically sympathetic nominees. Presidents can not reasonably be expected to turn a blind eye to judicial philosophy, but neither should they make it the single criterion for selecting candidates for lifetime appointments to the bench.

Future administrations, Republican and Democratic alike, should be unyielding on certain criteria, among them, fundamental competence, significant academic or trial experience, and an appreciation for and commitment to the vital role of the courts in protecting Americans' liberties. In addition, the trend in the last decade toward a whiter, wealthier, male-dominated judiciary represents a retreat on our nation's commitment to inclusion of all Americans in their own governance. Future administrations must do a better job than the current one, or its predecessor, of expanding the pool of appointments to include women and minorities.

Recommendation Two: The Courts Should Return to Their Traditional Role of Protector of Individual Rights and Liberties

In the last decade, Presidents Reagan and Bush have repeatedly argued that judges should "interpret the law, not make the law," and that the courts should generally defer to the democratically elected representatives of the people. On their face, both suggestions appear unobjectionable. But after a decade of Reagan-Bush appointments, a different purpose has emerged. Reagan-Bush judges have proved at least as judicially active as other presidents' appointments, perhaps more so. As the cases detailed in this report demonstrate, they have evidenced a willingness to override the clear intent of Congress and rewrite precedent, and they have, on occasion resorted to legislation by judicial fiat.

The Reagan-Bush argument that the courts had overstepped their constitutional mandate has served as little more than a convenient rationalization for a concerted effort to undo the significant progress of the past half century in the area of constitutional liberties. The judges appointed have shrunk from their constitutional mandate to enforce the liberties guaranteed by the Constitution and its amendments.

If the damage is to be undone, future appointments must be committed to doing what the courts have always done — defending individual rights and liberties while faithfully interpreting the will of the Legislature.

Recommendation Three: The Senate Must Exercise Its Constitutional Obligation to Provide Meaningful Advice and Consent

With a handful of exceptions, Presidents Reagan and Bush have enjoyed a generally open playing field in their effort to reshape the judiciary. In spite of the straightforward language of the Constitution granting the Senate co-equal power in the appointment process, the Reagan-Bush judicial revolution has met with only token resistance from the Senate. The few nominees who have been challenged, and the even smaller number who have been rejected, are the exceptions that prove the rule. The overwhelming majority of judicial nominees has been confirmed without significant scrutiny.

While Presidents Reagan and Bush must shoulder the burden for the damage their judicial selections have done to Americans' fundamental liberties, the Senate has failed the American people as well. Until the Senate rises to the challenge, the President will continue to have a free hand.

A common argument against greater Senate involvement in the process is the suggestion that the President somehow enjoys a preeminent constitutional role in the appointment process. But neither the text of the Constitution nor history supports the contention. The Constitution places appointment power in both branches, and throughout

America's first two centuries of constitutional government, the Senate has exercised its authority to reject a significant share of nominees.

A second argument against greater Senate involvement is the suggestion that the Legislative branch ought to restrict its consideration of nominees to matters of experience and integrity. Predictably, the argument most frequently is offered by allies or members of the Executive Branch, which has shown little willingness to forego detailed and specific questioning of candidates' ideological views. In essence, the White House argues that while it may consider the ideology and philosophy of its nominees, the Senate may not. That view is unsupported by the Constitution, and disproved by precedent.

For the judicial nominations process to produce the best judges, the Senate must stop being the absent player.

Recommendation Four: Congress and State Legislatures Should Work to Undo What Damage They Can

Given the political will, much of the damage of the Reagan-Bush courts could be undone by legislative action. Indeed, in the case of the Civil Rights Restoration Act and the Civil Rights Act of 1991, the U.S. Congress has moved effectively to overturn the Supreme Court's crabbed reading of plain legislative intent.

To fully undo the damage, such remedies are necessary on a number of fronts, including all of the areas discussed in this report: reproductive choice and the right to privacy, freedom of religion, civil rights and freedom of speech. In extraordinary circumstances, a constitutional amendment might even be necessary.

Significantly, legislative and constitutional remedies are necessary not just at the federal level but at the state level as well, where the impact of the Reagan-Bush judges has been equally severe. State courts and legislatures can and have provided protection for the fundamental rights of their citizens even where federal courts have refused to do so.

Recommendation Five: We the People Must Carry the Fight

While the Reagan and Bush administrations's unprecedented effort to reshape the judiciary has done considerable damage, they can hardly be accused of exceeding their constitutional authority. Both Presidents ran with the stated intent of reshaping the judiciary; as duly elected presidents, they were vested with the authority to select nominees; and they proceeded to live up to their campaign promises. Indeed, their defenders are quick to observe that if detractors want a different approach to judicial selection, they should elect a different president.

What seems so clear to those Reagan-Bush backers claiming a mandate for their judicial revolution, is much less clear to those who have researched Americans' attitudes on judicial selection issues. The plain truth, in spite of conservative claims to the contrary, is that judicial selection issues have played a comparatively small role in most Americans' voting decisions in the past.

To restore constitutional protections to their pre-Reagan status, that must change. Candidates must, in a constructive manner, make an issue of judicial nominations, and voters, in turn, must examine candidates with these issues in mind. That is true not just of presidential candidates, but of Senate candidates as well. We the people must also become more aware of the effects of the courts' rulings — not only in the areas covered by this report, but also with respect to protection of the environment, criminal law and many other subjects.

When campaigning is over and governing begins, Americans must continue to play an active role in judicial selection by expressing their views to the President and to the Senate when vacancies occur.

Some Reagan-Bush supporters have argued that public involvement in the confirmation process ought to be curtailed, calling for closed confirmation hearings, or for limiting the participation of organizations representing the public. On the grounds that the process has grown "too political," these voices call for exclusion of the American people from the selection of lifetime appointments to the bench.

But the public has a legitimate constitutional role in the process: the right to elect senators and presidents of their choosing and then to express their views to these elected representatives. That role is all the more important in this context, since the confirmation process is the final opportunity for the democratic branches of government to weigh in before a candidate assumes a lifetime seat on the bench. Proposals limiting the public's access to judicial-selection decisions are fundamentally anti-democratic. Such arguments must be rejected.

The road back from the Reagan-Bush judicial revolution may be difficult and tortuous. But for the courts to be returned to their traditional role of guarantors of liberty, for Americans to once again enjoy the full measure of their constitutional rights, it is a road we must follow nevertheless.

End Notes

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7. Transcript of "All Things Considered" broadcast, National Public Radio report, August 28, 1985.

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15. *Washington Post*, January 29, 1989.

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28. Original research by People For the American Way, November, 1990.

29. Sen. Joseph Biden (D-DE), "The Role of Advice and Consent in Constitutional Interpretation," speech to Georgetown Law School, November 6, 1985.

30. "Reagan Choices Alter the Makeup and Views of the Federal Courts," *Wall Street Journal*, February 1, 1988.

31. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

32. See Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 420 n.1 (1983) (explaining that lesser standard of review of restrictive abortion laws, under which restrictions would be struck down only if they "unduly burden" the abortion decision, would be "wholly incompatible with the existence of the fundamental right recognized in Roe v. Wade").

33. Webster v. Reproductive Health Services, 492 U.S. 490, 538 (1989) (Blackmun, J., dissenting).

34. See Moore, "Righting the Courts," *National Journal* (Jan. 25, 1992) at 201 (citing study by University of Kansas professor C.K. Rowland and graduate student Steve Alumbaugh in October 1990 issue of *Judicature*).

35. See Webster, 492 U.S. at 508-11, 539-40 n.1.

36. See Women's Health Center v. Webster, 871 F.2d 1377 (8th Cir. 1989).

37. See Coe v. Melahn, 1992 U.S. App. Lexis 3037 (8th Cir. 1992).

38. *See* *Planned Parenthood of Southeastern Pa. v. Casey*, 947 F.2d 682 (3rd Cir. 1991), *cert. granted*, 60 U.S.L.W. 3498 (U.S. Jan. 21, 1992); *Casey*, *supra*, 744 F.Supp. at 1367-68, 1370-72, 1392.

39. *See* *Casey*, *supra*, 947 F.2d 682; 744 F.Supp. at 1350, 1353-55.

40. *See* *Casey*, *supra*, 947 F.2d. 682; 744 F.Supp. at 1351-52.

41. *See* *Thornburgh v. American College of Obstetrics and Gynecology*, 476 U.S. 747 (1986) (ruling that Pennsylvania law restricting abortion, which was the predecessor to the law in *Casey*, was unconstitutional).

42. *See* *Kukla v. Village of Antioch*, 647 F. Supp. 799, 807-8 (N.D. Ill. 1986). *See also*, *e.g.*, *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Walls v. Petersburg*, 895 F.2d. 188 (4th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1296 (1990).

43. *See* *New York Times* (Nov. 5, 1990) at A14 (statement by retired Justice Powell).

44. *California v. Acevedo*, 111 S.Ct. 1982, 1994 (1991) (Stevens, J., dissenting).

45. *See* *Florida v. Riley*, 488 U.S. 445 (1989); *California v. Ciraolo*, 476 U.S. 207 (1986).

46. *See*, *e.g.*, *Williams ex rel. Williams v. Ellington*, 936 F.2d 881 (6th Cir. 1991); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

47. *See* *Wabun-Inini v. Sessions*, 900 F.2d 1234 (8th Cir. 1990).

48. *See* *United States v. Hendrickson*, 940 F.2d 320 (8th Cir.), *cert. denied*, 112 S.Ct. 610 (1991).

49. *See*, *e.g.*, *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir.), *cert. denied*, 112 S.Ct. 669 (1991).

50. *See*, *e.g.*, *Florida v. Bostick*, 111 S.Ct. 2382 (1991); *United States v. Lewis*, 921 F.2d 1294 (D.C. Cir. 1990).

51. *See*, *e.g.*, *O'Connor v. Ortega*, 480 U.S. 709 (1987).

52. *See*, *e.g.*, *California v. Greenwood*, 486 U.S. 35 (1988).

53. *See* *United States v. White*, 890 F.2d 1012 (8th Cir. 1989), *cert. denied*, 110 S.Ct. 3254 (1990).

54. *See Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); H.R. Rep. 102-40, 102d Cong., 1st Sess. (April 24, 1991) ("HR 102-40") at 89-93.

55. See Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); HR 102-40 at 23-32.

56. See West Virginia Hospitals, Inc. v. Casey, 111 S.Ct. 1138 (1991).

57. See Grove City College v. Bell, 465 U.S. 555, 599, 601-02 (1984) (Brennan. J., dissenting).

58. See Lorance v. AT&T Technologies, Inc., 490 U.S. 900, 913-14 (1989) (Marshall, J., dissenting).

59. See Martin v. Wilks, 109 S.Ct. 2180 (1989); HR 102-40 at 49-54.

60. See EEOC v. Arabian American Oil CO., 111 S.Ct. 1227 (1991).

61. See Los Angeles v. Lyons, 461 U.S. 95, 115, 137 (1983) (Marshall, J., dissenting)

62. See Rabidue v. Osceola Refining Co., 805 F.2d 611, 624, 626 (6th Cir. 1986) (Keith, J., dissenting).

63. See Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991).

64. See Presley v. Etowah County Commission, 60 U.S.L.W. 4135 (U.S. Jan. 27, 1992).

65. See American Tobacco Co. v. Patterson, 456 U.S. 63 (1982).

66. See Allen v. Wright, 468 U.S. 737 (1984).

67. See Valdez v. Church's Fried Chicken, 683 F.Supp. 596, 620 (W.D. Texas 1988).

68. See W.J. Moore, "Righting the Courts," *National Journal* (Jan. 25, 1992) at 205 (citing study by University of Kansas professor C.K. Rowland and University of Houston professor Ronald Karp).

69. See, e.g., Metro Broadcasting, Inc. v. FCC, 110 S.Ct. 2997 (1990) (5-4 decision by Supreme Court, including Justices Marshall and Brennan, upholding FCC affirmative action program).

70. Perry v. Sindermann, 408 U.S. 593, 597 (1972).

71. See Rust v. Sullivan, 111 S.Ct. 1759 (1991).

72. Stanford v. Sullivan, 773 F. Supp. 472, 478 (D.D.C. 1991), appeal pending.

73. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

74. See Connick v. Myers, 461 U.S. 138, 170 (1983) (Brennan, J., dissenting).

75. See Citizens for John W. Moore Party v. Board of Election Commissioners of Chicago, 845 F.2d 144 (7th Cir. 1988).

76. See United States v. Albertini, 472 U.S. 675 (1985).

77. See City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984).

78. See Cornelius v. NAACP Legal Defense Fund, Inc., 473 U.S. 788 (1985).

79. See United States v. Kokinda, 110 S.Ct. 3115 (1990). The Bush Justice Department has already sought to take advantage of such decisions, arguing in one case, for example, that government can effectively close off the public sidewalk on Constitution Avenue in Washington, D.C. opposite the Vietnam Veterans Memorial from First Amendment activity. See Henderson v. Lujan, 768 F.Supp. 1 (D.D.C. 1991), app. pending.

80. See Barnes v. Glen Theatre, Inc., 111 S.Ct. 2456, 2473-4 (White, J., dissenting).

81. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 513 (1969).

82. Id. at 506.

83. See Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 286 (Brennan, J., dissenting).

84. See Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989), cert. denied, 493 U.S. 1021 (1990).

85. See Hemry v. School Board of Colorado Springs, 760 F.Supp. 856 (D.Colo. 1991).

86. Virgil v. School Board of Columbia County, 862 F.2d 1517, 1525 (11th Cir. 1989).

87. See Kirkland v. Northside Independent School Dist., 890 F.2d 794, 797, 799-802 (5th Cir. 1989), cert. denied, 110 S.Ct. 2620 (1990).

88. Employment Division v. Smith, 110 S.Ct. 1595, 1606 (O'Connor, J., concurring)

89. See Goldman v. Weinberger, 475 U.S. 503 (1986) (later overturned as a result of special legislation enacted by Congress).

90. See Montgomery v. County of Clinton, 743 F.Supp. 1253 (W.D. Mich. 1990), aff'd, 940 F.2d 661 (6th Cir. 1991); Yang v. Sturner, 750 F.Supp. 558 (D.R.I. 1990).

91. See O'Lone v. Shabazz, 482 U.S. 342 (1987).

92. See Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S.Ct. 1319 (1988); id., 795 F.2d at 693.

93. *See* *Intercommunity Center for Justice and Peace v. I.N.S.*, 910 F.2d 42 (2d Cir. 1990); *American Friends Serv. Comm. Corp. v. Thornburgh*, 951 F.2d 957 (9th Cir. 1991).

94. *See* *Salvation Army v. Department of Community Affairs*, 919 F.2d 183 (3d Cir. 1990).

95. *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

96. *See* Brief for the United States in *Lee v. Weisman* at 6, 24-25.

97. *See* *Clayton v. State*, 884 F.2d 376 (8th Cir. 1989), *cert. denied*, 110 S.Ct. 1811 (1990).

98. *See* *Van Zandt v. Thompson*, 839 F.2d 1215 (7th Cir. 1988).

99. *See* *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3406 (U.S. Nov. 12, 1991).

100. *See* *Bowen v. Kendrick*, 108 S.Ct. 2562 (1988).

APPENDICES -- DETAILED ANALYSES OF THE REAGAN-BUSH COURT RECORD

Following are detailed analyses of the record of the Reagan-Bush courts, which were researched and drafted primarily by attorneys from several major Washington law firms. These analyses include the folowing:

A. The Reagan-Bush Courts and the Right of Privacy

B. The Reagan-Bush Courts and Freedom from Discrimination

C. The Reagan-Bush Courts and Freedom of Expression

D. The Reagan-Bush Courts and Freedom of Religion

THE REAGAN-BUSH COURTS AND THE RIGHT OF PRIVACY[1]

Over the last decade, the Reagan-Bush courts have severely restricted the fundamental right to privacy of all American citizens. With respect to choice and reproductive privacy, sexual privacy and privacy against government intrusion, the Reagan-Bush courts have already harmed citizens' rights, and those rights may be even more in jeopardy in the years to come.

In the area of reproductive choice, Roe v. Wade had been the law of the land. Specifically, a woman's decision whether or not to terminate her pregnancy was a fundamental right, and regulations that restricted this fundamental right were reviewed by the courts under a standard of "strict scrutiny" and rarely survived this test. In 1989, however, the Supreme Court decided Webster v. Reproductive Health Services, and demoted the right of reproductive choice from its fundamental status. The courts have already allowed restrictive laws to severely limit women's right to choice in a number of ways, such as banning public hospitals from providing abortion services, restricting physicians who perform abortions, implementing mandatory waiting periods, and requiring third-party consent. Judging by the recent trend, there is good reason to believe that the Court will further curtail the right of choice, and may flatly overrule Roe v. Wade.

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[1] This section was drafted by Washington attorneys Bahram Zia (Section I), Irwin Rappaport (Section II), and Deborah Levine (Section III). The views expressed herein are solely those of the drafters and do not necessarily reflect the views of their firm or other attorneys with the firm.

Sexual privacy has also suffered inroads into previously-established protection. Throughout the 1970s, the Court steadfastly protected minorities and those whose non-traditional opinions or lifestyles made them victims of discriminatory treatment. But in Bowers v. Hardwick, the Court abandoned both precedent and principle when it held that no fundamental right is violated when the state makes it a crime to engage in private, consensual, homosexual activities. Since Hardwick, the lower courts have expanded the holding in that case, sanctioning wide-ranging discriminatory treatment against homosexuals in government employment and elsewhere.

Within the last ten years, the Supreme Court has also sharply curtailed citizens' privacy against government intrusion. This has been accomplished by a shift in the way the Court applies the Fourth Amendment. First, by finding no reasonable expectation of privacy in various activities, the Court has been increasingly unwilling to find that the Fourth Amendment applies as a restraint on government intrusions. Second, the Court has been increasingly willing to abandon the traditional warrant and probable cause requirement, permitting even suspicionless searches in some cases.

The result has been to invade seriously the rights of all citizens to privacy at home, at school, at work, and on the road. For example, the federal courts have ruled that citizens have no reasonable expectation of privacy in a private backyard surrounded by a ten-foot fence, in sending out personal photographic film to be developed, or in disposing of refuse. According to the courts, a boss can search an employee's office or desk, and a school official can search a student's purse or locker without a warrant. Random mandatory drug testing, searches of interstate bus passengers without a warrant or any individualized suspicion, and numerous other invasions of privacy have been sanctioned by the courts.

The remainder of this section analyzes in more detail the impact of the Reagan-Bush courts on Americans' right to privacy. It sets forth the state of the law prior to the Reagan-Bush years, analyzes the impact of Supreme Court and lower court decisions over the last decade, and discusses the continuing threat to privacy rights posed in the future by the Reagan-Bush courts.

I. The Rights of Privacy and Choice

A. Status of the Law as of the Early 1980s

In 1973, the Supreme Court ruled that the constitutional right to privacy that it had recognized in prior cases,[2] most notably in Griswold v. Connecticut,[3] applied to reproductive choice and abortion. Specifically, the Court in Roe v. Wade[4] held that, because a woman's right to decide whether or not to terminate her pregnancy is "fundamental," regulations that restrict that right must be reviewed by the courts under a standard of "strict scrutiny." Under the strict scrutiny standard, governmental interference is justified only if: the government can prove a "compelling state interest" in regulating the conduct in question; and the law or regulation is narrowly drawn to achieve only those interests.[5] Few restrictions have ever survived the strict scrutiny test.

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[2] See, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception); Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Prince v. Massachusetts, 321 U.S. 158 (1944) (family relationships); Skinner v. Oklahoma ex rel. Williamson, 316 U.S.
(continued...)

The 7-2 Roe majority[6] explicitly rejected the alternative standard of review proposed by the dissent, the "rational basis" test.[7] In contrast to the strict scrutiny standard, under the rational basis test, a law is upheld if it

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[2] (...continued) 535 (1942) (procreation); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (childrearing and education).

[3] 381 U.S. 479, 485 (1965) (state regulation banning use of contraceptives by married persons held unconstitutional for "invading zone of privacy created by fundamental constitutional guarantees").

[4] 410 U.S. 113 (1973).

[5] Id. at 155.

[6] Justice Blackmun delivered the opinion of the Court in which Chief Justice Burger, and Justices Brennan, Stewart, Marshall, Powell and Douglas joined. Justices Stewart, Douglas and Burger filed concurring opinions. Justices White and Rehnquist filed dissenting opinions.

[7] Roe, 410 U.S. at 163.

merely bears a rational relation to a valid state objective.[8] Given the low level of judicial scrutiny, courts rarely invalidate laws under the "rational basis" test.[9] Applying the rational basis test to abortion would make reproductive rights highly vulnerable to regulation by the states, and a court would be able to strike down as unconstitutional only the most intrusive laws and regulations.[10]

The majority in Roe v. Wade noted that, although fundamental, the woman's right to decide whether or not to terminate her pregnancy is not absolute.[11] "[A] State may properly assert important interests in safeguarding health [of the mother], in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision."[12] In an effort to reconcile the state's interests with the privacy right of the woman, the Roe majority employed the trimester framework.

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[8] Id.

[9] See, e.g., Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

[10] The Texas abortion statute in Roe criminalized all abortions except those which were performed in order to save the life of the woman. In his dissent, Justice Rehnquist argued that the statute passed the rational basis test and was, therefore, constitutional. The Texas statute, in his opinion, would fail the rational basis test if it "were to prohibit an abortion, even where the mother's life is in jeopardy. . . ." Roe, 410 U.S. at 173.

[11] Id. at 154.

[12] Id.

During the first trimester, a medically induced abortion may be effectuated "... free of interference by the State."[13] After the first trimester, the state's interest in the health of the mother becomes "compelling" and permits the state to adopt regulations "reasonably related to the preservation and protection of maternal health." Once the fetus is "viable" -- that is, it has the capability of meaningful life outside the mother's womb -- the state's interest in prenatal life becomes compelling.[14] Viability is "usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."[15] The state may at that point regulate abortion, and even forbid it, except where necessary according to appropriate medical judgement to protect the life or health of the mother.

In a series of abortion decisions after Roe, the Court invalidated various attempts to restrict or discourage women from exercising their freedom of choice. Although the Court ruled that a state need not pay for abortion services,[16] the Court held that it was impermissible to require that abortions be performed only in hospitals or after approval by a physician or committee in addition to a woman's treating physician.[17] The Court invalidated mandatory waiting periods before abortions could be performed, and limited so-called "informed consent" or "biased counselling" statutes that sought to discourage women from choosing to have an abortion.[18]

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[13] Id. at 163 (emphasis added).

[14] Roe, 410 U.S. at 163.

[15] Id. at 160.

[16] See Maher v. Roe, 432 U.S. 464 (1977) (upholding Connecticut welfare regulation under which Medicaid recipients (continued...)

The Court also restricted the extent to which government could limit a woman's right to choose by requiring consent of a husband or parent to an abortion. Spousal consent requirements were ruled unconstitutional.[19]

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[16] (...continued)
received payments for childbirth expenses but not for nontherapeutic abortions); Poelker v. Doe, 432 U.S. 519 (1977) (upholding St. Louis' decision to provide publicly financed services for childbirth without providing corresponding services for nontherapeutic abortions); Harris v. McRae, 448 U.S. 297 (1980) (upholding Hyde Amendment which withheld from states federal funds under Medicaid program to reimburse the costs of nontherapeutic abortions). See also Beal v. Doe, 432 U.S. 438 (1977); William v. Zbaraz, 448 U.S. 358 (1980).

[17] Doe v. Bolton, 410 U.S. 179, 192-200 (1973).

[18] See Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986); Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 442-49 (1983). Specifically, the Court ruled that it was invalid to require that a woman seeking an abortion be told that life begins at conception, provided a detailed description of fetal development, informed of allegedly possible physical and psychological implications of abortion, and reminded of the availability of social service agencies to provide assistance with information with respect to childbirth, and that it was invalid to require that informed consent come only from the attending doctor, as opposed to a nurse or other qualified professional.

[19] Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 67-75 (1976).

Providing parents with absolute veto power over a minor's choice of abortion was also ruled unconstitutional, although the Court indicated that a parental consent statute could be proper if it contained a provision allowing a young woman to obtain an abortion without parental consent via court procedures which permit effective judicial bypass of consent requirements.[20]

Even as late as 1986, a majority of the Court adhered to the principle that the right to choose is fundamental and that restrictions on it must be strictly scrutinized. The Court specifically rejected in 1983, for example, a suggestion by Justice O'Connor that restrictions on abortion be invalidated only where they "unduly burden" the abortion decision, explaining that such a lesser standard would be "wholly incompatible with the existence of the fundamental right recognized by Roe v. Wade."[21]

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[20] Bellotti v. Baird, 443 U.S. 622, 643-44 (1979). Specifically, the Court explained that such a judicial bypass procedure must: 1) allow a minor to show that she possesses the maturity and information to make the abortion decision independently, in consultation with her physician; 2) allow her to show that, even if she is not equipped to make the decision independently, the desired abortion would be in her best interests; 3) ensure the young woman's anonymity; 4) be conducted with "sufficiently expedition" to provide a meaningful opportunity for an abortion to be obtained; Akron at 74 (blanket parental consent provision without judicial bypass held unconstitutional).

[21] Akron, 462 U.S. at 420 n.1.

B. Decisions by Reagan-Bush Judiciary Restricting the Right of Choice

1. The Decision in Webster v. Reproductive Health Service

Beginning in the late 1980s, the Reagan-Bush courts began to restrict severely women's right to choose. The clearest signal was Webster v. Reproductive Health Services,[22] where the Supreme Court greatly weakened women's abortion rights. In a break with years of precedent, the Court effectively demoted the right to an abortion from its fundamental status, and condemned it to review under a standard approaching the Court's lowest standard of review -- the rational basis test.

At issue in Webster was the constitutionality of three provisions of the Missouri abortion statute: (a) the preamble which declared that "the life of each human being begins at conception" and that "[u]nborn children have protectable interests in life, health and well being;" (b) the blanket prohibition on the use of public facilities and employees for performing abortions; and (c) the requirement that physicians conduct certain viability tests prior to performing abortions.

By a narrow 5-4 majority, the Court upheld the statute. All three Reagan appointees to the Court voted to sustain the statute, and their votes were decisive. Justice Kennedy joined a plurality opinion with Chief Justice

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[22] 492 U.S. 490 (1989).

Rehnquist and Justice White, while Justices Scalia and O'Connor wrote separate concurring opinions.

The plurality held that the preamble was "abortion-neutral" and hence constitutional. It reasoned that the terms of the preamble "can be read simply to express . . . [a] value judgment [by the state favoring child birth over abortion]."[23] That value judgment, according to the plurality, was permissible especially since no evidence had been offered to suggest that the preamble had been applied to limit appellees' rights.

In upholding the preamble, the plurality ignored its restrictive impact on the exercise of a woman's right to terminate her pregnancy. As a general matter, the court of appeals had found that the legislature "intended its abortion regulations to be understood against the backdrop of its theory on life."[24] Even the Solicitor General acknowledged that this backdrop places "a burden of uncertain scope on the performance of abortions."[25] For example, because the preamble defined fetal life as beginning upon "the fertilization of the ovum," it burdens the use of contraceptive devices, such as the intrauterine device (IUD) and the "morning-after pill," which may operate to prevent pregnancy after conception, as defined in the statute.[26]

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[23] Id. at 506.

[24] Id. at 539 n.1 (Blackmun, J., dissenting)(quoting Reproductive Health Service v. Webster, 851 F.2d 1071, 1076 (8th Cir. 1988).

[25] Id.

The plurality also upheld Missouri's broad restrictions on the use of public facilities and staff on the grounds that their constitutionality followed from the Court's abortion funding precedents.[27] This ruling ignored the fact, as found by the District Court and the Court of Appeals, that Missouri's ban clearly and impermissibly "narrow[ed] and in some cases foreclose[d] the availability of abortion to women."[28] For example, the prohibition on the use of public facilities may "prevent a woman's chosen doctor from performing an abortion because of his unprivileged status at other hospitals or because a private hospital adopted a similar anti-abortion stance. Such a rule could increase the cost of obtaining an abortion and delay the timing of it as well."[29] In addition, by broadly defining "public facility," the Missouri statute prohibited essentially private abortions (i.e. abortions performed by private doctors in a private office) on property owned, leased, or controlled by the government.[30] For example, as the dissent explained, the Missouri law prohibited abortions at the Truman Medical Center in Kansas City, where 97% of all abortions after 16 weeks were performed in 1985, because the Center was on ground leased from a government entity, even though the Center was a private hospital, staffed primarily by private physicians, and administered by a private corporation.[31]

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[26] Id. (Blackmun, J., dissenting) (quoting Brief for Association of Reproductive Health Professionals, et al. as Amicus Curiae 30-39). See also id. at 564-566 (Stevens, J. concurring) (possible interference with a women's right to use post-fertilization contraception violates contraception cases such as Griswold).

[27] Webster, 492 U.S. at 507-11.

[28] Reproductive Health Service v. Webster, 851 F.2d 1071, 1081 (8th Cir. 1988); Reproductive Health Services v. Webster, 662 F. Supp. 407, 428 (W.D.Mo. 1987).

[29] Webster, 851 F.2d at 1081.

Finally, the plurality upheld the viability testing provision of the statute. That provision provided that:

> Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engage in similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother.[32]

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[30] Webster, 492 U.S. at 539-40 n.1 (Blackmun, J., dissenting).

[31] Id.

[32] The Webster plurality rejected the District Court and the Court of Appeals interpretation of this provision as mandating tests to determine fetal weight and lung maturity for every fetus thought to be more than 20 weeks gestational age. The District Court further found that the only method to evaluate fetal lung capacity is by amniocentesis, a procedure that imposes additional significant health risks for both the pregnant woman and the fetus, and would, in any event, be useless for the purpose of determining lung maturity until no earlier than between 28 and 30

(continued...)

The plurality used this provision to reject Roe's trimester framework, and introduced a new standard for reviewing abortion regulations. The plurality acknowledged that the viability testing requirement burdened second trimester abortions to further the State's interest in potential life.[33] That state interest, according to the plurality, existed throughout a pregnancy not just at the point of viability.[34] Since under Roe the state could not regulate abortion in the interest of potential life until the third trimester, the Webster Court, in order to save the testing provision, rejected the analytic core of Roe, namely trimesters and viability.

Having rejected the Roe framework, the plurality upheld the viability testing provision because it "permissibly further[ed] the State's interest in protecting potential human life."[35] The Court's new standard seemed to be whether a challenged abortion regulation "permissibly furthers" a legitimate state interest. Since the state's interest in potential life is compelling throughout pregnancy in the

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[32] (...continued)
weeks of gestational age. Id. at 513-20. Thus, the District Court found, and the Court of Appeals agreed, that the provision arbitrarily imposed discomfort, risk, pain, additional costs and bore no rational relation to the state's interest in protecting fetal life.

[33] Id. at 519-20.

[34] Id. at 519.

[35] Webster, 492 U.S. at 519-20.

plurality's view, and would presumably be served if abortion is banned completely, virtually any restriction on abortion would thus arguably be permissible. As Justice Blackmun noted, "the more severe the hindrance [to a woman's ability to obtain an abortion], the more effectively (and permissibly) the State's interest would be furthered."[36]

The plurality claimed that its analysis left Roe v. Wade "undisturbed" although "modif[ied]" and "narrow[ed]."[37] However, as Justice Blackmun noted in his dissent, "this disclaimer is totally meaningless."[38] By "narrowing" and "modifying" Roe, the plurality in effect eviscerated Roe of its analytic core and replaced it with a minimal level of scrutiny. In so doing, the plurality "invite[d] every state legislature to enact more and more restrictive abortion regulations in order to provoke more and more test cases, in the hope that sometime down the line the Court will return the law of procreative freedom to the severe limitations that generally prevailed in this country before January 22, 1973 [when Roe v. Wade was decided]."[39]

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[36] Id. at 555 (Blackmun, J., dissenting).

[37] Webster, 492 U.S. at 521. The plurality explained, rather unconvincingly, that the facts of Webster differ from those in Roe. In Webster, the state of Missouri asserted its interest in potential life only at the point of viability, whereas, in Roe, Texas had asserted that interest from the point of conception, thus criminalizing all abortions, except where the life of the mother was at stake. Id.

[38] Id. at 538. (Blackmun, J., dissenting).

Justice Scalia concurred in the decision in Webster, arguing that the new Court majority had effectively overruled Roe v. Wade.[40] Justice O'Connor also concurred, but contended that the Court's decision did not contravene the holding of Roe v. Wade.[41] Notwithstanding this claim, Justice O'Connor explicitly noted that she "continue[d] to consider problematic" Roe's trimester framework.[42] Indeed, in a dissenting opinion in Akron, she argued that Roe "is clearly on a collision course with itself" and hence "unworkable."[43]

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[39] Id. Justice Scalia and Justice Blackmun, arguing from diametrically opposed positions, both agreed that the Webster decision effectively overruled Roe v. Wade. Id. at 532 (Scalia, J., concurring), 555 (Blackmun, J., dissenting). "If the Constitution permits a State to enact any statute that reasonably furthers its interest in potential life, and if that interest arises as of conception, why would the Texas statute [in Roe which criminalized all nontherapeutic abortions] fail to pass muster? One suspects that the plurality agrees." Id. at 556.

[40] Id. at 532 (Scalia, J., concurring).

[41] Id. at 529-31. Justice O'Connor argued that requiring tests to determine viability "only marginally, if at all, increase the cost of an abortion." Id. at 530. Moreover, the "examinations and tests required by . . . [this provision] are to be performed when viability is possible . . . . [T]he State's compelling interest in potential life postviability renders its interest in determining the critical point of viability equally compelling." Id. at 531.

[42] Id. at 529.

[43] See Akron, 462 U.S. at 458-59.

Both in Akron and Webster, Justice O'Connor proposed an alternative standard of review for abortion cases: the "undue burden" standard.[44] Under this standard, if a law places an "undue burden" on a woman's right to an abortion -- defined as an absolute obstacle or severe limitation[45] -- then strict scrutiny is applied.[46] In all other instances, which would apparently include the majority of restrictions, an abortion regulation would be reviewed under the rational basis test. Thus, in practice, most restrictions on abortion will inevitably be upheld under Justice O'Connor's test.[47] The net result of Webster, therefore, was to severely undermine the right of choice.

2. Supreme Court Decisions After Webster

After Webster, the Reagan-Bush Court majority has continued to undermine the fundamental nature of the right of choice through decisions relating to third-party consent to abortion. In Hodgson v. Minnesota,[48] the Court analyzed the constitutionality of Minnesota's parental consent and notification statute. The Minnesota statute was enacted in 1981 as an amendment to the Minors' Consent to Health Services Act.[49] The first part of the statute required that both parents[50] of an unemancipated minor be notified at least 48 hours before she had an abortion, unless an immediate abortion was necessary to prevent her death or the minor stated that she was a victim of physical or sexual abuse, with no judicial bypass.

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[44] Akron, 462 U.S. at 463; Webster, 492 U.S. at 529-30 (O'Connor, J., concurring).

[45] Akron, 462 U.S. at 464 (O'Connor, J., dissenting); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 828 (1986).

[46] Akron, 462 U.S. at 463 (O'Connor, J., dissenting). See Thornburgh, 476 U.S. at 828 (O'Connor J., dissenting) (repeating undue burden standard and citing dissent from Akron); Webster, 492 U.S. at 530 (O'Connor, J., concurring)(same); Hodgson v. Minnesota, 110 S.Ct. 2926, 2949-50 (1990) (O'Connor, J., concurring) (same).

[47] For example, Justice O'Connor found that Akron's second trimester hospitalization requirement which was struck by the majority, was not unduly burdensome and hence should have been upheld since it bore a rational relation to the State's legitimate interests. Akron, 462 U.S. at 467.

The second part of the statute, however, provided that, if the first part was ever judicially enjoined, the parental notice requirements would be enforced in combination with a judicial bypass. Under the judicial bypass, the minor could circumvent the parental notification requirements by persuading a judge that she was "'mature and capable of giving informed consent to the proposed abortion,' or that an abortion without notice to both parents would be in her best interest...."[51] The statute also provided that the bypass procedure shall be confidential, that it shall be expedited, and that the minor had a right to court-appointed counsel.[52]

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[48] 110 S. Ct. 2926 (1990).

[49] Id. at 2931. Under the original Act, a minor did not require the consent of her parents or guardians in order to obtain a number of confidential medical services including abortions, treatment for drug abuse, venereal disease, etc. The 1981 amendment singles out abortion as the one service that requires parental consent. Id.

[50] The statute provides exceptions in circumstances where persons entitled to notice cannot be located after reasonable effort, or if they have already consented in writing to the abortion. However, no exceptions are made for a divorced parent, a noncustodial parent, or a biological parent who never married. Id. at 2931-32.

The splintered Court's decision had two distinct holdings. In the first holding, the Court found that a two-parent notice requirement without a bypass was unconstitutional; in the second holding, the Court upheld the same notice requirement with a bypass, ruling as a matter of law that it complied with Bellotti v. Baird.[53] Only Justice O'Connor concurred in both parts of the Court's opinion.

Two specific aspects of the Hodgson decision demonstrate how the decision continues to undermine the fundamental right of choice of Roe v. Wade. First, six Justices[54] followed Webster's lead in demoting the woman's abortion rights from its fundamental status and reviewed the state restrictions under what amounted to the Supreme Court's lowest standard of review.[55] Four Justices, including Chief Justice Rehnquist and Justices Kennedy, Scalia and White, argued that the Court should have found the two-parent notice requirement constitutional because it was reasonable for the legislature to conclude that such a law would further legitimate state interests.[56] The plurality made this assertion despite the undisputed finding of the District Court that there was no factual basis upon which this court could find that the statute on the whole furthered in any meaningful way "the State's asserted interest."[57] Similarly, Justices Stevens and O'Connor noted that they would uphold parts of the statute that in their view, would "reasonably further the legitimate state interest" at stake.[58]

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[51] Id. at 2932-33.

[52] Id.

[53] 443 U.S. 622 (1979).

[54] Chief Justice Rehnquist and Justices White, Stevens, Kennedy, Scalia, and O'Connor.

[55] Although the six Justices employed a form of rational basis review to analyze the Minnesota statute, the Justices could not agree on a single standard.

In addition, as the dissent pointed out, the majority effectively ignored the findings of fact in Hodgson which showed that the Minnesota law imposed a significant burden on the right of choice without even substantially advancing any of the state's interests.[59] For example, the district court heard testimony from the judges who handled 90 percent of the bypass petitions in Minnesota, none of whom identified a positive effect of the law.[60] On the contrary, the judges who testified found that the proceedings were traumatic for minors and were completely ineffective in identifying mature and 'best interest' minors. In fact, of the 3573 bypass petitions heard in Minnesota between August 1, 1981 and March 1, 1986, only 9 petitions were denied.[61/] One judge characterized the procedure as "'merely a rubber stamp,'" another described his job as "'a routine clerical function on my part, just like putting my seal and stamp on it.'"[62/] In effect, "the Court deferred in Hodgson not to the legislature, but to its own untested assumptions."[63/]

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[56] Hodgson, 110 S.Ct. at 2962-69.

[57] Hodgson v. Minnesota, 648 F.Supp. 756, 775 (D. Minn 1986).

[58] Hodgson, 110 S.Ct. at 2944. While Justice Stevens noted that he would invalidate the two-parent notice requirement both by itself and with a bypass option, he indicated in a portion of his opinion joined only by Justice O'Connor that, using the rational basis test, he would uphold the State's attempt to impose a 48-hour waiting period on a minor's decision to have an abortion. Id.

[59] Id. at 2958-60.

[60] Hodgson, 648 F.Supp. at 775.

The Supreme Court further undermined the right of choice in Ohio v. Akron Center for Reproductive Health,[64/] where the Court ruled that provisions of the judicial bypass procedure in the Ohio parental notification law were sufficient to make the Ohio statute pass constitutional muster.[65/] As a preliminary matter, the majority noted that although the Court had in previous decisions required bypass procedures for parental consent statutes, the majority need

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[61/] Id. at 765.

[62/] Id. at 766.

[63/] The Supreme Court, 1989 Term - Leading Cases, 104 Harv. L. Rev. 129, 256 (1990).

[64/] 110 S. Ct. 2972 (1990).

[65/] Justice Kennedy announced the judgement of the Court and was joined by Chief Justice Rehnquist, and Justices White, Stevens, O'Connor, and Scalia. Justices Scalia and Stevens both filed separate concurring opinions. Justice Scalia reiterated his commitment to overruling Roe v. Wade, and suggested "leaving this matter to political process." Id. at 2984.

not decide whether such procedures are constitutionally required for parental notification statutes.[66] The Court's rationale for distinguishing between notification and consent was that the former does not give the parent a veto over the minor's abortion decision.[67]

However, as noted by the dissent, this rationale is flawed.[68] "[B]ecause of the minor's emotional vulnerability and financial dependency on her parents, and because of the 'unique nature of the abortion decision,' . . . and its consequences, a parental-notice statute is tantamount to a parental-consent statute."[69] While this holding did not affect the Ohio notification statute because it already had a bypass mechanism, it implicitly invited state legislatures to enact notice statutes without providing a judicial bypass.

The majority then upheld the bypass procedures in the Ohio statute after determining that it complied with the four prong test in Bellotti v. Baird. In so doing, however, the majority failed to effectively apply the protections provided in Bellotti, further undermining the right of choice.

Under the Ohio statute's bypass mechanism, unless the minor had counsel, she had to sign a complaint form to initiate the bypass procedure, and even if she had counsel, she was required to supply the name of her parents in at least four places.[70] The majority, in upholding the procedure, acknowledged that confidentiality differs from the anonymity required in Bellotti for a bypass procedure, but determined that the distinction did not have "constitutional significance in the present context."[71] As noted by the dissent, "[t]hat easy conclusion is irreconcilable with Bellotti's anonymity requirement."[72]

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[66] Id. at 2979.

[67] Id.

[68] Id. at 2985 (Blackmun, J., dissenting).

[69] Id. (citations omitted).

The majority also effectively eviscerated the Bellotti requirement that a bypass procedure work expeditiously. The Ohio statute required the trial court to make its decision within five business days after the minor filed her complaint; the court of appeals to docket an appeal within four days after the minor filed a notice of appeal; and the court of appeals to render a decision within five "days" after docketing the appeal. Although the majority acknowledged that the procedure may in certain cases require a delay of up to 22 days, it argued that this was a "worst-case-analysis" that may never occur.[73] However, as pointed out by the dissent, such cases are not rare and remote possibilities.[74] Moreover, because a minor often does not learn of her pregnancy until a late stage in the first trimester, time lost at that point can often be critical.[75]

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[70] Id. at 2980. The majority pointed to regulations requiring court employees not to disclose public documents. However, the provisions regarding the duty of court employees not to disclose public documents amounted to no more than general principles of confidentiality. As such, they did not foreclose the possibility of unauthorized, illegal, disclosure by state employees. Id.

[71] Id.

[72] Id. at 2987 (Blackmun, J., dissenting).

[73] Id. at 2980-81.

Additionally, the majority refused to acknowledge three defects in the Ohio statute that impair the right of choice and were simply not addressed in Bellotti and its progeny. First, under the Ohio statute, if the juvenile or appellate courts failed to act within the statutory time frame, an abortion was "constructively" authorized.[76] Thus, according to the state, a combination of a date-stamped copy of the minor's complaint and a docket sheet showing no entry, without more, would inform the physician that the abortion could proceed.[77] The majority found this constructive authorization mechanism to be adequate and determined that no additional affirmative authorization was necessary.[78] As such, it ignored the fact that, a physician who faced dire consequences, such as civil damages, criminal penalties, imprisonment, and revocation of his license for disobeying the statute, would be reluctant to proceed on the basis of such nebulous authorization.

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[74] Id. at 2988 (Blackmun, J., dissenting).

[75] See id.

[76] Id. at 2981.

[77] Id. at 2989 (Blackmun, J., dissenting) (quoting Brief for Appellant at 36).

[78] Id. at 2981.

Second, the Court upheld the Ohio statute's requirement that the minor prove maturity or best interest by a heightened standard of clear and convincing evidence.[79] The result of placing a higher burden of proof on the minor, as the dissent argued, was that "[e]ven if the judge is satisfied that the minor is mature or that an abortion is in her best interest, the court may not authorize the procedure unless it additionally finds that the evidence meets a 'clear and convincing' standard of proof."[80]

Third, the Court also upheld the Ohio statute's requirement that the minor choose among three complaint forms. The first alleges only maturity, the second alleges only best interests, and the third alleges both of these facts.[81] Under the statute, the minor received appointed counsel only after filing the complaint.[82]

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[79] The purpose of the standard of proof is to instruct the judge or the jury as to the level of confidence he or she should have in the correctness of the facts prescribed. See, e.g., Addington v. Texas, 441 U.S. 418, 424 (1979). The clear and convincing standard is the intermediate standard between the relatively lenient 'preponderance of evidence' test and the stringent 'beyond a reasonable doubt' inquiry.

[80] Akron, 110 S.Ct. at 2990 (Blackmun, J., dissenting).

[81] Id. at 2982.

[82] Id.

The majority upheld the pleading scheme, although it acknowledged that it could produce "some initial confusion."[83] The majority failed to offer any state interest in confounding the pregnant minor with alternative complaint forms that may later need to be rescinded and replaced by appointed counsel. Moreover, the majority failed to mention the fact that the pleading scheme granted broad discretion to the judge as to whether the pregnant mother could even amend her pleading.[84] "To allow the resolution of this vital issue to turn on a judge's discretion does not comport with Bellotti II's declaration that the minor who 'fails to satisfy the court that she is competent to make this decision independently . . . must be permitted to show that an abortion nevertheless would be in her best interests.'"[85]

The decisions in Akron and Hodgson illustrate the Court's willingness to uphold even the most restrictive consent laws as long as there is some judicial bypass, regardless of genuine adequacy. As the dissent in Akron pointed out, the Ohio law constituted a "tortuous maze"[86] designed by the state "in the legislative hope that she [the pregnant minor] will stumble, perhaps fall, and at least ensuring that she 'conquer a multi-faceted obstacle course' before she is able to exercise her constitutional right to an abortion."[87] The clear result is to further undermine the right of choice in Roe v. Wade.

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[83] Id.

[84] Id. at 2986 (Blackmun, J., dissenting).

[85] Id. (emphasis in original) (quoting Bellotti, 443 U.S. at 647-48).

[86] Id. at 2985 (Blackmun, J., dissenting).

C. Lower Court Decisions

Particularly after Webster, the federal courts of appeal have further undermined the right of choice in a number of respects, approving laws which impose mandatory waiting periods, limit physicians who perform abortions, and mandate other restrictions. In fact, one lower court decision effectively reverses a Supreme Court ruling six years ago which invalidated choice restrictions. Future cases pose further threats to Roe and the right of choice.

1. Planned Parenthood of Southeastern Pa. v. Casey

On April 22, 1992, the Supreme Court heard arguments in Planned Parenthood of Southeastern Pa. v. Casey on whether a Pennsylvania abortion statute is constitutional. The Supreme Court should hand down a ruling on the status of abortion rights by early summer. The case reached the Supreme Court following an appeal from the Third Circuit decision in the case.[88] Should the Supreme Court uphold the Third Circuit's ruling, it will have made a complete 180- degree turn from its decision in Thornburgh, a previous Pennsylvania case, where the Court ruled that a statute similar to the one in Casey was unconstitutional.[89]

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[87] Id.

[88] Planned Parenthood of Southeastern Pa. v. Casey, 947 F.2d 682 (3d Cir. 1991), cert. granted, 112 S.Ct. 932 (1992).

The Third Circuit in Casey rejected the strict scrutiny standard promulgated under Roe v. Wade, and applied the "undue burden" test in examining Pennsylvania's abortion statute, which is one of the most restrictive in the nation. The statute requires that: doctors provide to women state-mandated information designed to discourage abortion, such as information on fetal development, alternatives to abortion, and available public aid and other benefits if the pregnancy is carried to term; minors get written permission from one parent (with a judicial bypass); there be a 24-hour waiting period before an abortion is performed; abortion providers report to state authorities the name of the referring physician and the basis for specific medical judgments, with public disclosure of other facts to be made by abortion providers that receive public funds; and that wives notify their husbands, except in cases of reported spousal abuse. The district court, in holding this statute unconstitutional, stated that, if the law were to go into effect,[90] the 24-hour waiting period would force every woman seeking an abortion to make a minimum of two visits to an abortion provider, and therefore result in delays far in excess of 24 hours, since most physicians do not perform abortions on a daily basis, as well as significantly increasing the cost of obtaining an abortion.[91] The district court also found that the mandatory delay would be "particularly burdensome to those women who [had] the least financial resources, such as the poor and the young, those women that [had to] travel long distances, such as women living in rural areas, and those women that [had] difficulty explaining their whereabouts, such as battered women, school age women, and working women without sick leave."[92] Additionally, where the delay "will push patients into the second trimester of their pregnancy," the waiting period would "substantially" increase the cost of the procedure and make it "more dangerous" medically.[93] The court of appeals, in reversing the district court,[94] held that, with the exception of the last factor, none of the infringements caused by Pennsylvania's abortion regulation are "undue" unless they can be shown to have a "severe" or "drastic" impact.[95] Applying this framework to the Pennsylvania regulations, the court of appeals upheld all of the challenged statutory provisions except for the spousal notification requirement.

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[89] See Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986).

[90] The district court enjoined the pertinent provisions of the statute. Planned Parenthood of Southeastern Pa. v. Casey, 744 F.Supp. 1323, 1397 (E.D. Pa. 1990).

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[91] Id. at 1351-52. The mandatory 24-hour waiting period would force women to double their travel time or stay overnight at a location near the abortion facility. This will necessarily add either costs of transportation or overnight lodging or both to the overall cost of her abortion. Additionally, many women may lose additional wages or other compensation as a result of the mandatory 24-hour delay, if forced to miss work on two separate occasions. Two trips to the abortion provider may cause the women to incur additional expenses for food and child care. The district court also found that the delay is required even if the doctor determines that it would be unnecessary or medically dangerous, in the absence of a medical emergency, and that the mandatory information to be provided to women "may mislead or confuse the patient" and in most cases "is plainly inappropriate." Id. at 1350, 1352-1354. The court concluded that the disclosure requirements would likely cause increased harassment of abortion providers, unjustifiably interfere with doctors' exercise of medical judgment, and make it more difficult for women to obtain abortions. Id. at 1367-68, 1370-72, 1392.

[92] Id. at 1352.

Validation by the Supreme Court of the patient counselling and mandatory waiting period provisions in Casey would flatly contradict Akron and Thornburgh, where the Court invalidated similar informed consent and waiting period requirements.[96] Approving the spousal notification provisions would undermine or effectively overrule Danforth, where the Court struck down a spousal consent provision.[97] Even if the Supreme Court does not expressly overrule Roe in Casey, its decision is thus quite likely to repudiate a series of Supreme Court precedents which are crucial to protecting the right of choice.

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[93] Id.

[94] See Casey 947 F.2d 682. The Court of Appeals for the Third Circuit largely ignored the 387 findings of fact by the District Court that refuted its conclusions.

[95] Id. at 684.

[96] See discussion of Akron and Thornburgh, supra. In fact, the statute in Thornburgh was a predecessor to the statute in Casey, both of which were adopted in Pennsylvania.

[97] See discussion of Danforth, supra.

2. Other Lower Court Decisions

In addition to Casey, a number of other appellate courts have followed the lead of Webster and upheld further restrictions on choice. For example, Planned Parenthood v. Miller[98] involved a challenge to a Georgia law which forbids the performance of an abortion on a minor unless the minor signs a form stating that she freely and without coercion consents to the abortion, and one parent/guardian is notified, actually or constructively. The statute also authorizes the physician to notify the parent in person, by telephone, or by regular mail, unless the minor presents a statement by the parent that he/she has been notified. The statute also has a mandatory waiting period and a judicial bypass procedure. The district court found the law unconstitutional. The court of appeals reversed the lower court, finding that the law did not "unduly burden" a minor's abortion decision.[99] The court specifically noted that the Supreme Court appears to have abandoned strict scrutiny in favor of the more lenient standard in Hodgson and Webster, although it suggested that the Georgia statute would still survive strict scrutiny.[100]

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[98] 934 F.2d 1462 (11th Cir. 1991).

[99] Id. at 1471-75.

[100] Id. at 1475-1482.

Coe v. Melahn[101] involved a challenge to a Missouri statute requiring that no health insurance policy issued in the state cover "elective abortions" unless that coverage was provided via an optional rider, and with a separate premium. The statute defines an "elective abortion" as "an abortion for any reason other than spontaneous abortion or to prevent the death of the mother." The district court, granting plaintiff's motion for summary judgment, found that the statute was unconstitutional because it lacked any relationship to the interests advanced by the state.[102] The court of appeals reversed the grant of summary judgment and remanded the case back to the lower court for further proceedings. The court of appeals held that Roe is no longer the law of the land because the majority of the Supreme Court refused to apply the Roe trimester framework in Webster and Hodgson. The court instead adopted Justice O'Connor's "undue burden" analysis as the applicable legal standard. Because the plaintiff produced no evidence indicating that health insurance policies covering elective abortions are unavailable or prohibitively expensive, the court found that the statute did not place an "absolute obstacle or severe limitation" on a woman's abortion decision, and the plaintiff was not entitled to summary judgment, despite the fact that the statute clearly burdened the right of choice.

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[101] 958 F.2d 223 (8th Cir. 1992).

[102] Missouri claimed that the statute advanced two legitimate state interests: (1) reducing health insurance costs; and (2) protecting the interest of citizens opposed to subsidizing abortions through health insurance premium payments.

In Women's Health Center v. Webster,[103] the court approved an even more serious abortion restriction. This case concerned a statute requiring physicians who perform abortions to have surgical privileges at hospitals offering obstetrical or gynecological care, despite the fact that many abortions are performed at clinics not connected with hospitals. The court initially noted that the "[Supreme] Court has required that if a state law impinging on abortion is to be held valid, it must further a compelling state interest -- a strict scrutiny test."[104] However, the court then stated that application of the strict scrutiny test is triggered only when the state law places "sufficiently substantial and not de minimis" restrictions on abortion.[105] The court then rejected plaintiffs' claim that the statute has a significant impact because of interference with a patient's potential choices and with the doctor-patient relationship, and affirmed the lower court's finding that there was no evidence that any woman seeking an abortion has been or will be hindered from obtaining one by reason of the statute.[106] The court then upheld the statute, stating that it was rationally related to the state's legitimate interest in ensuring that prompt backup care is available to patients who undergo abortions in outpatient clinics, and refused to apply the compelling interest test.[107]

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[103] 871 F.2d 1377 (8th Cir. 1989).

[104] Id. at 1380.

[105] Id. (quoting Charles v. Carey, 627 F.2d 772, 777 (7th Cir. 1980)).

[106] Id. at 1380-81.

Similarly, in Planned Parenthood v. Minnesota,[108] the Eight Circuit reversed a district court decision invalidating Minnesota's fetal disposition law. The challenged provision required "dignified and sanitary" disposition of fetal remains which result from abortion or other medical procedures by cremation, internment, or a manner designated by the commissioner of health. The court of appeals, citing the Supreme Court's decision in Webster, found the law constitutional.[109] The court held that, in light of Webster, the term "dignified" in the preamble did not color all later references to acceptable disposal methods in the statute.[110] The court specifically noted that the Supreme Court had adopted a less rigorous standard of review and that prior to Webster, Akron would have controlled, so that the term "dignified" would have made the statute unconstitutionally vague.[111]

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[107] Id. at 1381.

[108] 910 F.2d 479 (8th Cir. 1990).

[109] Id. at 486.

[110] Id. at 482-83.

[111] Id. at 482-83, 486.

In addition to the restrictive abortion laws discussed above, other states have passed highly restrictive abortion laws in light of Webster. Notable examples include Louisiana, Utah, and Guam, which have passed laws directly prohibiting abortion in many cases and challenging Roe v. Wade. While lower courts have generally struck down these restrictive regulations, and the rights in question survive temporarily, those rights are insecure at best.[112/] As Justice Blackmun noted in his dissent in Webster, the frightening truth is that the constitutional rights guaranteed under Roe would not survive the court's analysis in Webster and its recent progeny, and the new conservative Supreme Court has provided no substitute for Roe's protective umbrella.[113/] Even assuming that the Supreme Court does not expressly overrule Roe in Casey, it is quite likely that whatever remains of the fundamental right to choose after that decision will survive only until the Supreme Court considers the Louisiana, Guam, or similar abortion restrictions in the very near future. At that point, only state courts and legislative remedies, such as the proposed Freedom of Choice Act in Congress, will be available to protect the fundamental right of privacy recognized in Roe v. Wade.

[112/] See, e.g., Guam Society of Obstetricians and Gynecologists v. Ada, 776 F.Supp. 1422 (D. Guam 1990), aff'd 1992 U.S. App. LEXIS 6903 (9th Cir. 1992); Sojourner v. Roemer, 772 F. Supp. 930 (E.D.La. 1991).

[113/] Webster v. Reproductive Health Services, 492 U.S. 490, 538 (1989)(Blackmun, J., dissenting).

II. Protection of Sexual Privacy Before and After Bowers v. Hardwick

Until 1986, the Supreme Court interpreted the Constitution to protect an individual's right to make decisions regarding intimate relationships and the use of his or her body. This decisional autonomy may be seen as the right to "sexual privacy." In its decision in Bowers v. Hardwick,[114] however, the Court abandoned these precedents and the principles behind them when it held that no fundamental right is violated when the state makes it a crime to engage in homosexual sodomy in the privacy of one's own bedroom with another consenting adult.

A. Status of the Law as of the Early 1980s

Prior to the Hardwick decision, the Court made clear that the Constitution protected the "right to be let alone" in one's beliefs, thoughts, emotions, and sensations -- "the most comprehensive of rights and the right most valued by civilized man."[115] "[T]he privacy of a person's own home" and the First Amendment protected, for instance, the right to engage in activities that caused no harm to others such as possessing and using obscene books or videos.[116] Privacy under the Constitution was also held to inhere in close relationships such as those we have with our family and with others whom we love or with whom we seek to share sexual intimacy. In this regard, the Court struck down a state law prohibiting white persons from marrying outside their race because the right to marry a person of one's choice is "one of the vital personal rights essential to the orderly pursuit of happiness by free men."[117] The Court specifically recognized the "freedom of personal choice in matters of marriage and family life" and "consistently acknowledged a 'private realm of family life which the state cannot enter.'"[118]

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[114] 478 U.S. 186 (1986) (hereinafter "Hardwick").

[115] Stanley v. Georgia, 394 U.S. 557, 564 (1969) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

[116] Stanley, supra, at 564.

This private realm, the Court explained, does not protect only married persons or couples, but extends rather to each individual with respect to "the most intimate of human activities and relationships . . ."[119] Protecting such relationships "from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty."[120] For instance, governmental intrusion into "the sacred precincts" of a bedroom in order to determine whether a contraceptive had been used was held to be "repulsive to the notions of privacy . . ."[121]

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[117] Loving v. Virginia, 388 U.S. 1, 12 (1967).

[118] Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977).

[119] Carey v. Population Services International, 431 U.S. 678, 685 (1977).

[120] Roberts v. United States Jaycees, 468 U.S. 609, 618-19 (1984).

The cases upholding sexual privacy rights fit within a broader range of precedents standing for tolerance of minority views and lifestyles. In sharp contrast to the philosophy announced in the Hardwick decision, the Supreme Court cautioned in 1972 that "[a] way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different."[122] In a passage clearly ignored when it permitted Georgia to imprison persons for up to 20 years for engaging in homosexual sodomy, the Court in 1975 admonished that "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."

B. The Hardwick Decision and its Flaws

1. Hardwick Arrested in His Bedroom

At around 7:00 one morning in 1982, Michael Hardwick walked out the door of a gay bar in Atlanta where he was helping to install some insulation.[123] As he walked outside, an Atlanta police officer saw him toss an open beer bottle into the trash can near the front door of the bar. The officer, who knew that the bar was for gay men, cited him for drinking in public.

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[121] Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

[122] Wisconsin v. Yoder, 406 U.S. 205, 224 (1972) (State cannot force Amish people to comply with a compulsory school attendance law); see also O'Connor v. Donaldson, 422 U.S. 563, 575 (1975) (mental illness alone cannot justify involuntary confinement of a person posing no danger to others).

[123] The facts surrounding Hardwick's arrest are taken from Hardwick's own account of the events in The Courage of Their Convictions 392-96 (Peter Irons ed. 1990).

When Hardwick had not paid the fine or appeared in court on the scheduled court date,[124] the officer personally processed a warrant for his arrest (allegedly the first time the officer had done so in 10 years) and went to Hardwick's house to make an arrest. Hardwick was not home, and when he later heard from his roommate that the officer had appeared with a warrant, Hardwick went to court and paid the fine. Approximately three weeks later, however, the same officer returned to Hardwick's house at 8:30 a.m., and entered the unlocked door even though the earlier warrant had expired. A friend sleeping on Hardwick's couch allowed the officer to look around.

The officer pushed open Hardwick's bedroom door, which was slightly ajar, and observed him engaging in mutual oral sex with another man. The officer arrested Hardwick and his partner for violating a Georgia law making it a felony, punishable by up to 20 years in prison, for any person to engage in sodomy (oral or anal intercourse). Both Hardwick and his partner were consenting adults.

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[124] Hardwick explained that there were two court dates on the ticket: the date printed on the ticket was a day earlier than the court date written on the top of the ticket by the citing officer. He had planned to appear in court on the later date which turned out to be the incorrect one. See The Courage of Their Convictions at 394.

Although the District Attorney dropped the charges, Hardwick sued, asking the court to declare that Georgia's sodomy law violated his rights under the U.S. Constitution. The District Court ruled that he failed to state a claim, but the Court of Appeals held that the Georgia law violated Hardwick's fundamental right of intimate association protected under the Ninth and Fourteenth Amendments.

2. Supreme Court Upholds Criminal Ban on Homosexual Sodomy

The Supreme Court reversed, ruling 5-4 that the Constitution did not prohibit Georgia from criminalizing homosexual sodomy, even in a private bedroom between consenting adults. The Court held that the law as applied to homosexual sodomy violated no fundamental right under the Fourteenth Amendment's Due Process Clause. Thus, because the sodomy law reasonably advanced the state's interest in upholding the "presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral," it was constitutional. During oral argument in the Supreme Court, counsel for Georgia admitted that the State only enforced its sodomy law against homosexuals.[125]

As the dissent, commentators, and even one of the justices in the majority (subsequently) acknowledged, the Hardwick decision is flawed in many respects. The Court's holding clearly departs sharply from prior law in the area of sexual privacy.

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[125] Hardwick at 201 (Blackmun, J., dissenting) (citing Tr. of Oral Arg. 4-5 and Hardwick v. Bowers, 760 F.2d 1202, 1205-06 (11th Cir. 1985).

The Georgia sodomy law, as written, applies to heterosexuals and homosexuals alike. The Court, however, declared that the issue in the case was whether there is a fundamental right to engage in homosexual sodomy. The real issue, however, was whether there is a fundamental right of any person (not just homosexuals) to be left alone by the government to make decisions regarding private consensual sexual activity, not just to engage in particular behavior.

The Court's earlier fundamental rights cases such as Carey focused more generally on the individual's right to make a decision regarding a private matter, and did not limit their inquiry to the right to engage in a particular form of behavior. In Hardwick, by contrast, the Court focused narrowly on the right to engage in sodomy instead of upon the right to choose to engage in an intimate activity or relationship (i.e., private, consensual sexual activity with another adult).

The Court asserted that a right, in order to be fundamental, must be either "deeply rooted in our nation's history and traditions" or "implicit in the concept of ordered liberty." However, in actually analyzing whether there was a fundamental right at issue in Hardwick, the Court failed to apply the second half of this test in any meaningful way.

The Court emphasized the fact that anti-sodomy laws reach far back into history rather than acknowledging the modern trend of repealing such laws. As is clear from the Court's own recitation of the history of sodomy laws, 25 states between 1961 and the date of the Hardwick decision decriminalized sodomy.[126] In addition, simply because a law was on the books at the time the Bill of Rights and Fourteenth Amendment were ratified does not mean that the law is constitutional.[127] After all, when the Bill of Rights and the Fourteenth Amendment were ratified, not only were there sodomy laws, but also laws barring women and blacks from voting, barring interracial marriage, and imposing racial segregation -- laws which have all been declared unconstitutional by the Court.[128] Sodomy laws, like those former laws, disguise invidious discrimination and invasion of fundamental rights.

Further, the Court ignored the fact that the Georgia law conflicted with general "liberty" principles established in prior sexual privacy rights cases -- principles such as individual autonomy over personal decisions (upheld in Eisenstadt, Carey, Roe, and Thornburgh) and the right of intimate association (protected in Carey and Roberts) -- and in cases upholding tolerance for alternative lifestyles (seen in Coates, Yoder, and O'Connor). Instead, it narrowly construed its earlier decisions as recognizing fundamental rights only in very precise categories, such as the right to choose to use contraceptives or to make decisions about child-rearing. Having so narrowly analyzed prior precedent, the Court then concluded that the right to practice homosexual sodomy bore no resemblance to these particular rights. In fact, however, an individual's decision about how and with whom to engage in intimate sexual relations is as fundamental as (and is a predicate to) the individual's decision to use contraceptives[129] or to bear a child.[130]

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[126] Hardwick at 193-94.

[127] "It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897), quoted in Hardwick at 199 (Blackmun, J., dissenting).

[128] See Hardwick at 210 & n.5 (Blackmun, J., dissenting) ("The parallel between Loving and this case is almost uncanny.").

The Hardwick decision is an abandonment of the established principle that the government may not be used to perpetuate private bias. In Palmore v. Sidoti,[131] the Court unanimously held that a state could not deny custody of a child to its white mother, who had remarried a black man, based on concerns that, due to racial prejudice, the child would be stigmatized.

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[129] Protected in Eisenstadt and Carey.

[130] Protected in Roe, Akron Center for Reproductive Health, Inc. v. City of Akron, 462 U.S. 416, 419-20 (1983), and Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 772 (1986).

[131] 466 U.S. 429 (1984).

> The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.[132]

In Hardwick, however, the Court did not consider that laws such as Georgia's similarly give effect to moral and religious condemnation of homosexuality; indeed, the Chief Justice appeared to approve of such reasoning in support of Georgia's statute.[133]

The Hardwick Court analogized sodomy laws with laws against adultery and other sexual crimes, as well as with possession of drugs or stolen goods in the home, minimizing the fact that consensual homosexual sodomy is victimless (so long as it is non-commercial and none of the participants is married).[134] Decisions such as Coates, Cohen, Yoder, and O'Connor clearly document the constitutional foundation for protecting the expression of a minority viewpoint or an alternative lifestyle from oppression by an intolerant majority. Given the illegitimacy of the state's interest in imposing a particular brand of morality upon the public, the state has no legitimate interest in combatting sodomy. The strength of the state's interest is diminished further in light of the fact that Georgia dropped all criminal charges against Michael Hardwick despite his announcement that he would continue to violate the statute, and the fact that the Georgia legislature did not even make a moral judgment that homosexual sodomy is immoral -- the Georgia law applies to all persons, regardless of sexual orientation. Both on its own terms and in light of the Court's previous privacy rulings, Hardwick is seriously flawed and diminishes privacy rights.

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[132] Palmore at 433.

[133] See Hardwick at 196 (Burger, C.J., concurring) ("Condemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards").

[134] Hardwick at 195-96.

C. The Aftermath of Hardwick

Based upon the Hardwick decision, several federal appellate courts have reached the conclusion that the government may discriminate against a person solely because he or she is homosexual. According to these courts, such discrimination, so long as it is somehow rationally related to a legitimate government interest, does not deprive that person of equal protection of the laws.

In these cases, the appeals courts have upheld employment policies in the executive branch and the military which bar homosexuals or treat homosexuality as a negative factor in hiring decisions. One court relied on Hardwick to rule that government employees could be required to answer, on a background questionnaire, whether they had ever had "sexual relations" with a person of the same sex, and there was no constitutional right of privacy to decline to answer.[135] Similarly, the Defense Department was permitted to continue subjecting homosexual but not heterosexual applicants for security clearances to expanded investigations and mandatory adjudications.[136] One court cited Hardwick in holding that it was proper to discharge a lesbian from the Army Reserves simply because she had expressed her homosexual preference.[137] In a similar case, a court upheld the release of a homosexual from active duty in Navy Reserves based on a policy of discharging for homosexual conduct, and concluded that "[a]fter Hardwick it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm."[138]

According to these decisions, sodomy is the behavior that defines homosexuals. Since sodomy can be criminalized under Hardwick, these courts have held that the government may, without violating the Equal Protection Clause, discriminate against homosexuals as a group, and need only show a rational basis for doing so. This conclusion is vastly significant. It means that the federal government, or a state or local government, could pass a law saying that homosexuals may not be hired for government jobs. Homosexuals could be barred from collecting government benefits or receiving government services. In fact, it means that the government could discriminate against homosexuals in any manner it chooses, provided a separately-protected right is not involved, and as long as some rational basis could be articulated, without violating the Constitution. Such a result would dramatically impair privacy rights, and in fact cannot be justified even by the decision in Hardwick.[139]

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[135] Walls v. Petersburg, 895 F.2d 188 (4th Cir. 1990); see also Padula v. Webster, 822 F.2d 97, 102 (D.C. Cir. 1987) (ruling that FBI could penalize homosexuals in hiring decisions).

[136] See High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563, 571-72 & n.6 (9th Cir. 1990) (High Tech Gays I); cf. Webster v. Doe, 108 S.Ct. 2047, 2054 n.8 (1988) (CIA argues that general policy against employing homosexuals presents no colorable constitutional claim in light of Hardwick).

[137] Ben-Shalom v. Marsh, 881 F.2d 454, 464-65 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990).

[138] Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990).

Trial courts, taking instruction from these courts of appeal and the Supreme Court, have similarly sanctioned the same logical leaps. They have concluded that the decision in Hardwick necessarily means that homosexuals as a group cannot claim that they are a "suspect classification" deserving heightened judicial scrutiny of governmental discrimination against them.[140]

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[139] The Hardwick Court explicitly stated that it was not ruling on the question of whether discrimination against homosexuals violates the Equal Protection Clause. In addition, the appeals courts overlook the fact that homosexuality is an orientation or preference as well as a form of behavior. Hardwick dealt only with one particular form of homosexual conduct and did not sanction generalized discrimination against those with a homosexual status. Hardwick at most holds that the state may distinguish homosexuals from other groups when criminalizing sodomy, but says nothing about making such distinctions in any other circumstances, sexual or otherwise. It is ludicrous to suggest that "homosexual behavior" is limited to, and homosexuals are defined by, sodomy -- just as it would be ludicrous to state that heterosexual behavior is limited to, and heterosexuals can be defined by, vaginal intercourse.

Courts have allowed homosexual prisoners (or those presumed to be homosexual) to be treated adversely based on their homosexuality. One court dismissed a prisoner's claim that he was falsely classified as a homosexual, on the grounds that discrimination on the basis of homosexuality is not subjected to heightened judicial scrutiny after Hardwick.[141] Another trial court similarly dismissed an action brought by a prisoner who claimed arbitrary and unethical treatment of homosexuals by prison administration.[142]

In partially remanding a district court decision involving termination of a homosexual foreign service officer, former Chief Judge Wald of the D.C. Circuit Court of Appeals highlighted the danger of such unfettered discrimination against homosexuals:

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[140] See Doe v. Sparks, 733 F. Supp. 227, 231 (W.D. Pa. 1990) (if homosexual conduct is not part of substantive due process, then it cannot be the basis for an equal protection challenge by the class which engages in that conduct); Doe v. University of Michigan, 721 F. Supp. 852, 861 n.11 (E.D. Mich. 1989) (citing Hardwick to support conclusion that there is no federal constitutional prohibition of sexual orientation discrimination); contrast Jantz v. Muci, 759 F. Supp. 1543, 1546 (D. Kan. 1991) (recognizing that Hardwick did not speak to equal protection issue and dealt with conduct, not status).

[141] Powell v. Flaherty, 1989 U.S. Dist. LEXIS 538 (1989); see also Engler v. Rowland, 1991 U.S. Dist. LEXIS 6619 (1991)(holding that prisoner has no right to be housed with other gay prisoners in part because, after Hardwick, the practice of homosexuality is not a fundamental right and homosexuals are not a suspect classification for equal protection purposes).

[142] Davis v. Zimmerman, 1988 U.S. Dist. LEXIS 7407 (1988).

> . . . I find highly disconcerting the notion that government agencies can terminate outstanding civil servants without any substantive review simply by invoking 'national security.' The possibility of unreviewable agency 'security officers' giving effect to homophobic or other biases is all too apparent.[143]

As Judge Canby of the Ninth Circuit explained, federal judges relying on Hardwick have concluded that "our government may discriminate against homosexuals whenever it is able to put forth a rational basis for doing so. . . That decision is wrong," Judge Canby concluded, "and it will have tragic results."[144]

In addition, the Hardwick decision sets a dangerous precedent with respect to other government invasions of sexual and intimate personal privacy. By suggesting that Georgia's law was justified by the state's interest in its own view of morality, the Hardwick majority implicitly sanctioned other invasions of privacy and other rights on similar bases. Enforcement of a law prohibiting heterosexual sodomy, for example, could be justified on the same basis. One lower court has already cited Hardwick as support for the proposition that there is no fundamental right of privacy as to heterosexual relations between an unmarried man and woman.[145] Indeed, a plurality of the Supreme Court has cited Hardwick for the proposition that the state may ban non-obscene nude dancing to uphold the public interest in morality.[146]

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[143] United States Information Agency v. Krc, 905 F.2d 389, 400 (D.C. Cir. 1990) (affirming in part the trial court's holding that USIA could terminate but remanding for consideration of claims of violation of equal protection and interference with pursuit of employment).

[144] High Tech Gays v. Defense Industrial Security Clearance Office, 909 F.2d 375, 376 (9th Cir. 1990) (High Tech Gays II) (Canby, J., dissenting from denial of rehearing en banc). For example, in states where sodomy laws remain, they may be used as justification to deny or revoke professional licenses to homosexuals or deny them custody or adoption rights on the ground that they have engaged in "criminal behavior."

D. Conclusion

On October 18, 1990, former Associate Justice of the Supreme Court Lewis J. Powell, a swing vote in Hardwick, told a group of law students, with regard to the Hardwick case, "I think I probably made a mistake in that one." In retrospect, he thought that "the dissent had the better of the arguments."[147] The impact of Powell's now-acknowledged mistake has been enormous. Had Justice Powell, or Reagan appointee Justice O'Connor, voted the way that Powell now acknowledged is correct, the severe damage done by Hardwick to privacy rights could well have been avoided. As a result of Hardwick, however, Americans' rights of privacy have been and will continue to be seriously impaired.

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[145] Kukla v. Village of Antioch, 647 F.Supp. 799, 807-8 (N.D. Ill. 1986).

[146] See Barnes v. Glen Theatre, Inc., 111 S.Ct. 2456, 2462 (1991).

[147] Linda Greenhouse, "When Second Thoughts Come Too Late," The New York Times, Nov. 5, 1990, at A14.

III. Privacy Against Government Intrusion and Search

One of the most basic constitutional rights of all Americans is the right to be free from unwarranted governmental intrusion or search and seizure. The Fourth Amendment specifically protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Prior to the 1980s, the Supreme Court specifically recognized that the "Constitution extends special safeguards to the privacy of the home," requiring a judicially authorized search warrant or consent in most cases before government can physically intrude on a person's home.[148]

In addition, the Court recognized, the Constitution protects individuals from significant government intrusions on personal privacy outside the home unless justified by a search warrant or, under limited circumstances, other proof of probable cause to believe that an individual had engaged in misconduct. The Fourth Amendment, the Court held, applies wherever a citizen has a reasonable expectation of privacy, since the Constitution "protects people, not places."[149]

Over the last decade, however, the Reagan-Bush courts have seriously eroded citizens' rights to privacy against government intrusion. As Justice Marshall noted in 1989, the Supreme Court majority has moved a long way towards "reading the probable-cause requirement out of the Fourth Amendment."[150] In particular, the Reagan-Bush courts have substantially eroded the right to privacy against physical government intrusion in four areas: at home, at school, at work, and while travelling.

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[148] United States v. Orito, 413 U.S. 139, 142 (1973). See also Payton v. New York, 445 U.S. 573, 586 (1980).

[149] Katz v. United States, 389 U.S. 347, 351-52 (1967) (applying Fourth Amendment to electronic eavesdropping outside the home). See also, e.g., Mincey v. Arizona, 437 U.S. 385, 390-91 (1978); Chambers v. Maroney, 399 U.S. 42, 51 (1970).

A. Privacy at Home

1. Supreme Court Decisions

The Supreme Court has led the way in weakening the right to privacy at home. In California v. Greenwood,[151] the Court held that the police can search trash left out on the curb for collection without securing a warrant authorizing the intrusion. In Greenwood, the police asked Greenwood's trash collector to segregate his trash and turn it over to the police. After searching the trash, the police found evidence of drug use, which ultimately led to Greenwood's arrest. The Court held that the police inspection was not a search because Greenwood had sufficiently "exposed [his] garbage to the public," forfeiting any reasonable expectation of privacy in the trash.[152] The Court summarily concluded that because there was a risk that third parties -- be they garbagemen or snoops -- would look through Greenwood's trash, or that because the intervening act of a third party, such as scavenging animals, would expose the trash, there could be no reasonable expectation of privacy.

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[150] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 636 (1989) (Marshall, J., dissenting).

[151] 486 U.S. 35 (1988). Chief Justice Rehnquist and Justices Blackmun, Stevens, O'Connor, and Scalia joined Justice White's majority opinion. Justices Brennan and Marshall dissented. Justice Kennedy took no part in the consideration or decision of the case.

As Justice Brennan explained in dissent, however, compelling reasons make clear that the majority ruling permits significant invasions of personal privacy, contradicting the Fourth Amendment:

> A search of trash, like a search of the bedroom, can relate intimate details about sexual practices, health, and personal hygiene. Like rifling through desk drawers or intercepting phone calls, rummaging through trash can divulge the target's financial and professional status, political affiliations and inclinations, private thoughts, personal relationships, and romantic interests. It cannot be doubted that a sealed trash bag harbors telling evidence of the "intimate activity associated with the 'sanctity of a man's home and the privacies of life,'" which the Fourth Amendment is designed to protect.

Id. at 50-51 (Brennan, J., dissenting).

In addition, the facts in Greenwood demonstrated that a reasonable expectation of privacy was violated by the government. The trash was in opaque, sealed containers and hidden from view.[153] Merely because the trash was being discarded, and not transported, fails to justify the reduced degree of protection it received. Indeed, local municipal regulations forbid town trash collectors from rifling through trash placed for collection.[154] While there is risk that the trash collectors or someone else might disobey the law, that possibility alone should not defeat privacy expectations.[155] Indeed, that rationale would permit warrantless searches of anyone's home since there is always a chance that a burglar might enter.[156] Greenwood thus erodes the rights of all citizens to privacy against government intrusion.

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[152] Id. at 40.

[153] Id. at 46-49 (Brennan, J., dissenting). See, e.g., Robbins v. California, 453 U.S. 420, 426 (1981) (no distinction between worthy and unworthy containers for Fourth Amendment purposes).

Other Supreme Court decisions further reduce the right of privacy at home. In California v. Ciraolo,[157] the Court held, in a 5 to 4 decision,[158] that government agents can spy on someone's backyard, without a warrant or showing of probable cause, by observing the yard from a plane flying at an altitude of 1,000 feet. While Ciraolo clearly exhibited a subjective expectation of privacy in his backyard -- he installed ten foot high fences to enclose it -- his expectation was declared unreasonable because he did nothing to guard against aerial observance. "Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed."[159] As the dissent argued, while airplane passengers undoubtedly have a theoretical opportunity to people's backyards during takeoffs and landings, the Court never explained why that fact is alone was sufficient to "nullif[y] expectations of privacy."[160] The risk that a private or commercial traveller might glance down and observe activities in a person's backyard "is simply too trivial to protect against,"[161] and provides no justification for authorizing the state to use modern technology to enable it to spy on activities in a person's backyard.

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[154] Greenwood, 486 U.S. at 52 (Brennan, J., dissenting).

[155] Moreover, the defendant had no choice but to leave his trash out for collection as a municipal regulation so directed him. Thus, to argue that the defendant knowingly exposed his trash is to ignore the fact that he had no choice but to dispose of it by conveying it to third parties. Id. at 54-55.

[156] Id. at 54.

[157] 476 U.S. 207 (1986).

[158] Chief Justice Burger delivered the opinion of the Court in which Justices White, Rehnquist, Stevens, and O'Connor joined. Justice Powell filed a dissenting opinion in which Justices Brennan, Marshall, and Blackmun joined.

In Florida v. Riley,[162] a plurality of the Court[163] further extended Ciraolo and held that no search occurs when the police observe the interior of a partially covered greenhouse from a helicopter flying at an altitude of 400 feet. Relying on Ciraolo, the Court concluded that there can be no objectively reasonable expectation of privacy in an area so long as it is possible somehow for the public to lawfully see in that space.

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[159] 476 U.S. at 213-14.

[160] Id. at 223 (Powell, J., dissenting).

[161] Id. at 224.

[162] 488 U.S. 445 (1989).

[163] Justice White announced the judgment of the Court and Chief Justice Rehnquist, and Justices Scalia and Kennedy joined his opinion. Justice O'Connor concurred in the judgment. Justice Brennan, joined by Justices Marshall and Stevens, dissented.

These decisions fundamentally contradict the basic rationale of Katz and similar rulings. In Katz, the Court noted that while the police could use electronic devices to intercept phone conversations without physically invading a person's home, the standard for determining whether a search has occurred depends not on physical intrusion, but rather on whether there has been an intrusion into an area in which defendant has a reasonable expectation of privacy. Under Katz, merely because a conversation may be overheard without a physical intrusion did not end the inquiry as to whether the police conducted a "search." The present Court majority, however, by seizing on the mere theoretical risk of exposure as a sufficient basis to nullify expectations of privacy, has transformed the Katz test and seriously diminished the protection against arbitrary governmental intrusions at home.[164]

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[164] Outside of the United States, the Reagan-Bush courts have gone further and ruled that there is no privacy protection at all against U.S. government agents searching or seizing property from the home of a non-resident alien located in a foreign country. See United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); United States v. Inigo, 925 F.2d 641, 656 (3d Cir. 1991); United States v. Davis, 905 F.2d 245 (9th Cir. 1990), cert. denied, 111 S. Ct. 753 (1991).

2. Lower Court Decisions

On the basis of these Supreme Court decisions, lower courts have increasingly authorized the government to search a person's home or personal effects without a warrant or probable cause. The Tenth Circuit recently held that the police can conduct a warrantless search of a bag tossed by a suspect onto a friend's porch on the theory that the suspect "abandoned" the bag, and thus has no reasonable expectation of privacy in it.[165] The Seventh and Eighth Circuits have upheld warrantless searches of a rented storage unit after concluding that the defendants had no reasonable expectation of privacy in the units.[166] One court has permitted the government to subject someone's mail to canine sniff without obtaining a search warrant.[167]

A District Court in Colorado ruled that there was no governmental misconduct when a police officer literally walked through a defendant's home. The home was for sale and the officer, with the permission of the defendant's real estate agent, walked through the house. The search did not reveal any evidence, but the court stated that any evidence found would have been admissible, in part because the defendant lost his reasonable expectation of privacy in the home when he had authorized prospective buyers, although certainly not police, to enter it.[168]

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[165] United States v. Morgan, 936 F.2d 1561, 1576-78 (10th Cir. 1991), cert. denied, 112 S. Ct. 1190 (1992).

[166] United States v. Boden, 854 F.2d 983 (7th Cir. 1988); United States v. Hendrickson, 940 F.2d 320 (8th Cir.), cert. denied, 112 S. Ct. 610 (1991).

[167] United States v. Sklar, 721 F. Supp. 7, 13-14 (D. Mass. 1989).

Based on California v. Carney,[169] where the Court ruled that there was a reduced privacy expectation in a mobile home, the lower courts have ruled that police can search a mobile home without a search warrant.[170] In fact, the government can freely intrude on and search a mobile home even where it is attached to utility poles and parked in a residential driveway.[171]

Lower courts have similarly allowed police, without a warrant, to sneak up a driveway at night, hide behind hedges, and seize trash bags physically located on someone's property.[172] Similarly, courts have permitted warrantless search and seizure of telex communications in trash or of garbage placed in trash cans.[173] In Wabun-Inini v. Sessions,[174] the court ruled that government agents could, without a warrant, seize even the private photos that someone brings to a store to be developed, arguing that because the developing process exposes them to persons in the store, there is no reasonable expectation of privacy. Such lower court rulings have further jeopardized the right of privacy.

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[168] United States v. Harnage, 662 F. Supp. 766 (D. Colo. 1987).

[169] 471 U.S. 386 (1985).

[170] See, e.g., United States v. Ervin, 907 F.2d 1534 (5th Cir. 1990) (warrantless search of a camper-trailer); United States v. Hill, 855 F.2d 664, 667-68 (10th Cir. 1988) (warrantless search of a houseboat).

[171] See United States v. Hamilton, 792 F.2d 837, 842-43 (9th Cir. 1986).

[172] United States v. Hedrick, 922 F.2d 396 (7th Cir.), cert. denied, 112 S. Ct. 147 (1991).

B. Privacy at School

In New Jersey v. T.L.O.,[175] the Supreme Court significantly undermined the privacy rights of students at school, ruling that school authorities could search a student's purse, locker, or other property without a warrant or even without a showing of probable cause. Instead, the majority ruled that such a search could be permitted simply if it was "reasonable," and even suggested that individualized suspicion that a particular student had committed a wrong may not be necessary.[176]

The dissent pointed out that the majority had significantly weakened Fourth Amendment protection for students. Until T.L.O., the Court had always required probable cause before permitting the government to conduct a full-scale search. When the Court has permitted searches on reasonable suspicion, those searches have been only minimally intrusive and necessary to protect crucial law enforcement needs.[177] The Court's elimination of the probable cause requirement in T.L.O. had no similar justification.

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[173] See United States v. Trice, 864 F.2d 1421 (8th Cir. 1988), cert. denied, 491 U.S. 914 (1989); United States v. Wilkinson, 926 F.2d 22, 27 (1st Cir.), cert. denied, 111 S. Ct. 2813 (1991); United States v. Carmona, 858 F.2d 66 (2d Cir. 1988); United States v. Gregg, 829 F.2d 1430 (8th Cir. 1987), cert. denied, 486 U.S. 1022 (1988).

[174] 900 F.2d 1234 (8th Cir. 1990).

[175] 469 U.S. 325 (1985).

[176] Id. at 342, n.8.

Based on T.L.O., the lower courts have sanctioned even more intrusive invasions of privacy at school. For example, a federal court of appeals denied a damages claim from a high school student who was strip searched for evidence of drugs without probable cause, without even discussing the intrusiveness of the search.[178] In another recent case, a school district's random urinalysis program for students participating in interscholastic athletics was found to be consistent with the Fourth Amendment.[179] The Eighth Circuit upheld a warrantless search of a student by a school administrator in conjunction with a law enforcement officer based on finding that the search was reasonable.[180] Lower courts have also permitted extensive interrogation of students, and upheld a school administrator's search of student hotel rooms on a class trip based on T.L.O..[181] Based on these cases, further invasion of students' privacy rights can be expected in the future.

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[177] For example, in Terry v. Ohio, 392 U.S. 1 (1968), the Court authorized police to stop and frisk based on reasonable articulable suspicion, a less exacting standard than probable cause. The limited search that police were permitted to conduct was solely to see whether the suspect was armed.

[178] Williams ex rel. Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991)

[179] Schaill ex rel. Kross v. Tippecanoe County School Corp., 864 F.2d 1309 (7th Cir. 1988).

C. Privacy in the Workplace

As a result of a series of Reagan-Bush court decisions, workers enjoy significantly diminished freedom from employer searches. This decrease in privacy rights is most evident in two distinct areas. First, the government can search the employee's workspace with relatively little justification. Second, employers can drug test their workforces without any reason to suspect employees of drug use.

1. Supreme Court Decisions

A plurality of the Court in O'Connor v. Ortega[182] held that an employer can search an employee's office, desk, and filing cabinets without a warrant, and without probable cause, if the search is reasonable "under all the circumstances."[183] As in T.L.O., the dissent criticized the majority for failing to justify such a significant departure from Fourth Amendment principles.

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[180] Cason v. Cook, 810 F.2d 188, 193 (8th Cir.), cert. denied, 482 U.S. 930 (1987).

[181] See Edwards ex rel. Edwards v. Rees, 883 F.2d 882 (10th Cir. 1989); Webb v. McCollough, 828 F.2d 1151 (6th Cir. 1987).

[182] 480 U.S. 709 (1987).

[183] Id. at 725-26.

The Court majority further eroded protections against government intrusion several years later, when it authorized the government to administer mandatory drug tests to employees without a warrant, probable cause, or any individualized suspicion of wrongdoing. In Skinner v. Railway Labor Executives' Association,[184] the Court upheld Federal Railroad Administration regulations mandating drug testing of railway employees after certain accidents and in other situations, regardless of evidence of drug use. The Court asserted that the intrusions into privacy caused by the mandatory taking of blood or observing a person produce a urine sample were minimal, and were outweighed by the government's interests in safety.[185]

Justices Marshall and Brennan vigorously dissented. The government's rule forced "entire railroad crews to submit to intrusive blood and urine tests," including "piercing of [the] skin by a hypodermic needle," even in the absence of "any evidence of drug or alcohol use or other wrongdoing."[186] The dissent noted that such testing gave government private information, irrelevant to drug use, on subjects such as an individual's genetic or other medical conditions, providing a "periscope through which [it] can peer into an individual's behavior in her private life."[187] The dissent explained that allowing such intrusive blanket intrusions upon large numbers of employees without probable cause or any individualized suspicion whatsoever was contrary to past practice and precedent and violates "basic constitutional rights."[188]

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[184] 489 U.S. 602 (1989).

[185] Id. at 627-28.

[186] Id. at 635, 644 (Marshall, J., dissenting).

The Court went further in National Treasury Employees Union v. Von Raab.[189] At issue in Von Raab was a Customs drug testing program aimed at three classes of Customs employees: those directly responsible for drug interdiction, those who carry firearms, and those who have access to classified information. Any person wishing to qualify for or maintain any job within the above three classes was required to pass a urinalysis drug test. Relying on Skinner, the Court held that Customs' need to deter drug use warranted blanket tests without any individualized suspicion.

Four justices, including Justice Scalia, vigorously dissented. As the dissent explained, there was no proof of "even a single instance" of drug use leading to problems among Customs agents, many of whom had nothing to do with drug enforcement, much less any individualized suspicion.[190]

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[187] Id. at 647.

[188] Id. at 635.

[189] 489 U.S. 656 (1989).

[190] Id. at 683 (Scalia, J., dissenting).

Particularly because the justification for the suspicionless searches was simply the generalized problem of drug use, Von Raab represents a severe and unprecedented incursion on Fourth Amendment rights.

2. Lower Court Decisions

In the wake of Skinner and Von Raab, the lower courts have approved numerous other drug testing programs, some of which are even broader and more intrusive than those permitted by the Court. For example, in International Brotherhood of Teamsters v. Department of Transportation,[191] the Ninth Circuit, noting that "[p]recedent dictates much of the framework for our analysis",[192] recently upheld the Federal Highway Administration's random urinalysis program which could subject well over three million commercial motor vehicle operators to random, suspicionless drug tests without the requirement of a warrant or probable cause. At least six other circuit courts of appeal have concluded that random mandatory drug testing without any individualized suspicion does not violate the Fourth Amendment.[193]

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[191] 932 F.2d 1292 (9th Cir. 1991).

[192] Id. at 1298.

[193] See Hartness v. Bush, 919 F.2d 170, 172-73 (D.C. Cir. 1990), cert. denied, 111 S. Ct. 2890 (1991) (stating that "[w]e are guided of course by those decisions of the Supreme Court and of this court that bear on the question" and holding random drug testing of government employees with "secret" national security clearances consistent with the Fourth Amendment); Taylor v. O'Grady, 888 F.2d 1189, 1199 (7th Cir. 1989) (holding random drug testing of correctional officers (continued...)

Following Ortega, lower courts have authorized numerous other workplace searches of and intrusions on employees for non-criminal purposes, such as searching fire fighters' lockers, with no showing of probable cause.[194] One court has held that an employer's regulations can defeat otherwise reasonable expectations of workplace privacy.[195]

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[193] (...continued) permissible); Thomson v. Marsh, 884 F.2d 113, 115 (4th Cir. 1989) (per curiam) (approving random testing of civilian employees at chemical weapons plant); Guiney v. Roache, 873 F.2d 1557, 1558 (1st Cir.), cert. denied, 493 U.S. 963 (1989) (in light of Court's decision in Von Raab, approving rule permitting random drug testing of police officers); Bluestein v. Skinner, 908 F.2d 451 (9th Cir. 1990), cert. denied, 111 S. Ct. 954 (1991) (sanctioning random drug testing of airline personnel); Willner v. Thornburgh, 928 F.2d 1185 (D.C. Cir.), cert. denied, 112 S. Ct. 669 (1991) (permitting drug testing for applicants for attorneys at Justice Department); National Federation of Federal Employees v. Cheney, 884 F.2d 603, 610-15 (D.C. Cir. 1989), cert. denied, 493 U.S. 1056 (1990) (upholding random suspicionless drug testing of civilian employees who fly and service aircraft, occupy law enforcement positions, and who are drug sensitive but enjoining testing of drug testing laboratory workers and others who do not hold safety-sensitive positions; Policemen's Benevolent Ass'n v. Township of Washington, 850 F.2d 133, 141 (3rd Cir. 1988) cert. denied, 490 U.S. 1004 (1989) (authorizing random drug testing of police officers); Rushton v. Nebraska Public Power Dist., 844 F.2d 562, 567 (8th Cir. 1988) (permitting random testing of nuclear power plant employees); McDonell v. Hunter, 809 F.2d 1302, 1308-09 (8th Cir. 1987) (allowing mandatory testing of correctional officers).

[194] See, e.g., Chicago Fire Fighters Union v. City of Chicago, 717 F. Supp. 1314 (N.D. Ill. 1989) (employer can search fire fighters' lockers without warrant); Shields v. Burge, 874 F.2d 1201 (7th Cir. 1989) (suggesting in dicta that a search for work related misconduct is reasonable based solely on an affidavit stating that there were reports of employee misconduct and that the employee had been the subject of a six month investigation); Leckelt v. Board of Commissioners of Hospital District No. 1, 714 F. Supp. 1377 (E.D. La. 1989), aff'd, 909 F.2d 820 (5th Cir. 1990).

[195] United States v. Taketa, 923 F.2d 665 (9th Cir. 1991).

By permitting workplace searches without warrants or probable cause, the Reagan-Bush courts have seriously impaired the right to privacy in the workplace.

D. Privacy While Travelling

Despite the Fourth Amendment's explicit guarantee of the "right of the people to be secure in their persons" against unreasonable searches and seizures, the Reagan-Bush courts have seriously weakened Americans' right to be free from government intrusion while travelling. In Michigan Department of State Police v. Sitz,[196] the 5-4 Court majority relied on a balancing test to hold that a random police roadblock to detect drunk drivers, again with no probable cause or individualized suspicion, was reasonable within the meaning of the Fourth Amendment.

Sitz represents a significant change in the Court's analysis of reasonableness. As the dissent pointed out, the Court simply accepted the government's assertion that the roadblocks presented a reasonable method of addressing the problem of drunk driving, effectively giving the executive branch unilateral power to define what is reasonable under the Fourth Amendment. The majority did not itself analyze whether the state's method was an effective and minimally intrusive technique of addressing the problem.

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[196] 496 U.S. 444 (1990).

The Court sanctioned further government intrusion on individuals while travelling in Florida v. Bostick.[197] The government conduct at issue in Bostick has been an increasingly common police enforcement tactic. Typically, the police board a bus that is on a layover and question passengers without any reasonable basis to suspect them of illegal conduct. The officers, who are in uniform and carrying weapons in recognizable weapons pouches, generally occupy the seat next to a passenger and block the aisle to the exit.

In Bostick, two police officers boarded a bus on a temporary stopover in Fort Lauderdale, Florida. Although there was nothing suspicious about Bostick, two officers approached him, asking to see his ticket and some identification. The documentation Bostick produced was ordinary, but the police continued to question him and asked whether they could search his luggage. While the issue of whether he in fact consented to the search of luggage was not decided, the police did search the luggage and found cocaine. The Court overruled the Florida Supreme Court and held that the police tactic was proper, claiming that Bostick was theoretically free to terminate the encounter despite the obviously intimidating police presence.

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[197] 111 S.Ct. 2382 (1991).

In United States v. Sokolow,[198] the Court majority approved another increasingly common police tactic leading to invasion of privacy: use of a drug courier profile. The majority ruled that the police had reasonable suspicion to stop Sokolow in an airport because he met a DEA drug courier profile based on such factors as paying in cash for his tickets.

The dissent strongly disagreed, explaining that drug profiles are poor indicia of criminality since they are based on non-criminal behavior and are so broad and contradictory that virtually any traveler can be targeted on that basis. As the dissent pointed out, police have stopped individuals based on drug profiles where they were the first to leave a plane, the last to leave a plane, or deplaned in the middle. Buying a one-way ticket can meet a profile, but so can buying a round-trip ticket. Acting nervously, or acting too calmly, can qualify.[199]

Privacy while travelling suffered a further blow last year in California v. Acevedo.[200] In that case, a six-justice majority, including Justices O'Connor, Kennedy, Scalia, and Souter, voted to overrule a 1979 decision and hold that government could search a suitcase or other closed container found inside a car without a warrant, even when the car is in police custody and police have time to obtain a warrant. As the dissent pointed out, the majority opinion relied on "arguments that conservative judges" -- including former Chief Justice Burger who wrote the 1979 opinion overruled by the Court -- have "repeatedly rejected in past cases."[201/] The dissent concluded that while it is "too early to know how much freedom America has lost today" as a result of the decision, the "magnitude of the loss is, however, not nearly as significant as the Court's willingness to inflict it without even a colorable basis for its rejection of prior law."[202/]

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[198] 490 U.S. 1 (1989).

[199] Id. at 13-14 (Marshall, J., dissenting).

[200] 111 S.Ct. 1982 (1991).

Following the Supreme Court's lead, the lower courts have repeatedly sanctioned government intrusions on individuals' privacy while travelling. For example, in United States v. White,[203/] the court ruled that no illegal search had occurred and the police acted properly when they followed a woman into a restroom and observed her activities in a stall through a gap in the door. The courts have held that travellers in train roomettes have diminished expectations of privacy.[204/] Courts have authorized police to board buses,

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[201/] Id. at 1994 (Stevens, J., dissenting).

[202/] Id. at 2003.

[203/] 890 F.2d 1012 (8th Cir. 1989), cert. denied, 110 S.Ct. 3254 (1990).

[204/] See United States v. Tartaglia, 864 F.2d 837, 841 (D.C. Cir. 1989); United States v. Colyer, 878 F.2d 469, 476 (D.C. Cir. 1989).

interrogate people, and even ask to search their luggage without any suspicion of wrongdoing.[205] Coupled with the Reagan-Bush courts' decisions on privacy at home, at work, and at school, recent court rulings on privacy while travelling have seriously damaged the rights of all Americans to be free from government intrusion.

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[205] See United States v. Lewis, 921 F.2d 1294 (D.C. Cir. 1990).

THE REAGAN-BUSH COURTS AND FREEDOM FROM DISCRIMINATION[1]

A key right of all Americans is the right to be free from discrimination. To ensure the vitality of that right, Congress has passed numerous civil rights laws that promise equality of opportunity to all people in areas such as employment, education, and voting, regardless of their gender, race, religion, or national origin and provide comprehensive statutory remedial schemes to compensate victims of discrimination for their injuries.

Over the past decade, however, the Reagan-Bush courts have dramatically limited the scope and effectiveness of our anti-discrimination statutes and other safeguards by misinterpreting Congressional intent and reversing long-standing judicial precedent that gave substance to these protections. In particular, the courts have severely limited federal statutory civil rights protections, often allowing the very discriminatory behavior the laws were intended to prohibit; made it impossible for many bias victims even to get to court and seek relief; and seriously restricted the remedies available for civil rights violations. The result has been not only to contradict the intent of Congress, but also to severely damage the right of all persons to be free from discrimination.

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[1] This section was drafted by Michael E. Coe, Christopher M. Heimann, Elizabeth M. Kiingi and Jill D. Whitcomb. The views expressed herein are solely those of the drafters and do not necessarily reflect the views of their firm or other attorneys with the firm. This section also was drafted by M. DeSales Linton of the Georgetown Law Center's Women's Law and Public Policy Fellowship Program. This section of the report was made possible in part by funds granted to Ms. Linton through the Fellowship program sponsored by the Charles H. Revson Foundation. The statements made and views expressed, however, are solely the responsibility of the authors.

I. Reagan-Bush Court Limitation and Amendment of Federal Civil Rights Laws

Studies have documented the antipathy of the Reagan-Bush courts towards civil rights. One study found, for example, that Reagan-Bush judges are more than twice as likely to rule against discrimination complaints as judges appointed by President Carter.[2] Beyond their voting record in individual cases, however, the Reagan-Bush courts have acted to severely limit and effectively amend by judicial decision-making a series of key Congressional statutes protecting civil rights. This judicial activism has occurred with respect to four critical civil rights laws: Title VII of the 1964 Civil Rights Act, the Civil Rights Act of 1866, Title IX of the Education Amendments of 1972, and the 1965 Voting Rights Act. While Congress has acted to repair some of the damage, the Reagan-Bush courts have nonetheless seriously weakened civil rights protections.

A. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 was passed by Congress in order to eliminate from the workplace all discrimination based on gender, race, ethnic origin or religion. It represents a national decision to completely outlaw employment discrimination, because such discrimination injures business and society and excludes from the workforce people capable of making a substantial contribution to our economy. Cognizant that invidious discrimination takes many forms, Congress worded Title VII broadly to prohibit not only blatant examples of prejudice, but also more subtle and sometimes unintentional, "built-in headwinds" that nevertheless have the same exclusionary effect as overt discrimination. Over the last decade, however, the Reagan-Bush courts have contradicted Congress' intent and given judicial sanction to numerous discriminatory employment practices prohibited by Title VII under previous court decisions.

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[2] See W.J. Moore, Righting the Courts, National Journal at 205 (Jan. 25, 1992) (citing study by University of Kansas professor C.K. Rowland and University of Houston professor Ronald Karp documenting that while Carter appointees upheld race discrimination complaints in 59% of cases, Reagan-Bush appointees did so in only 13% of cases).

1. Job Practices with Discriminatory Impact: The Wards Cove Decision

In a unanimous opinion by Chief Justice Burger in 1971, the Supreme Court in Griggs v. Duke Power Co.,[3] effectuated the Congressional intent that Title VII protect workers from practices that have a discriminatory effect, or a "disparate impact," regardless of their intention, as well as from intentional bias. It concluded that unless an employer could prove that such discriminatory practices were necessary to the functioning of the business or essential to the job in question, Title VII required that they be discontinued.[4] Congress ratified the logic of Griggs the following year when it passed the 1972 Amendments to the Act that extended coverage to state and local governments.[5] In the two decades after Griggs, the courts continued to apply the decision against practices with discriminatory impact. For example, the courts ruled that discriminatory employment practices resulting from a multi-component system could be challenged under Title VII as long as the plaintiff could show that the cumulative effect of the system had an adverse discriminatory impact.[6]

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[3] 401 U.S. 424 (1971).

The importance of Griggs cannot be overestimated. Indeed, William H. Brown, former Chair of the EEOC during the Nixon administration, testified before Congress in 1990 that "the significant advancements of minorities and women into jobs historically held by white males in a large measure is a direct result of the impact of the Griggs decision."[7] By making the workplace more efficient, Mr. Brown explained, Griggs has had a positive impact on employers as well.[8]

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[4] Accord, e.g., Dothard v. Rawlinson, 433 U.S. 321, 331 n. 14 (1977); Ablemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

[5] See H.R. Rep. No. 238, 92d Cong., 1st Sess. 8.

[6] See, e.g., Green v. USX Corp., 843 F.2d 1511, 1521-24 (3d Cir. 1988); Griffin v. Carlin, 755 F.2d 1516, 1525 (11th Cir. 1985).

[7] Hearings on H.R. 4000 before the House Committee on Education and Labor and Subcomm. on Civil and Constitutional Rights, Vol. I, 101st Cong., 2d Sess., 514 (1990).

In 1989, however, a 5-4 Supreme Court majority flouted Congressional intent and effectively overruled Griggs by allowing employers to utilize employment practices that are not discriminatory on their face, but that nevertheless adversely impact women and minorities. It also erected virtually insurmountable barriers to proving a claim based on this "disparate-impact" discrimination. In what the dissent categorized as a most devastating "sojourn into judicial activism,"[9] the majority reversed longstanding precedent in order to "essentially immunize ... practices [of overt and institutionalized discrimination] from attack under a Title VII disparate-impact analysis."[10] In Wards Cove Packing Co. v. Atonio,[11] the Court thus dismantled over eighteen years of precedent designed to implement the intent of Congress in passing Title VII.

Despite a system of job stratification and segregation at Alaskan canneries which Justice Stevens noted bore "an unsettling resemblance to aspects of plantation economy,"[12] the Court majority concluded that no disparate-impact violation was shown. In doing so, "the Court [took] three major strides backwards in the battle against race discrimination."[13]

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[8] Id. at 25.

[9] 490 U.S. 642, 663 (Stevens, J., dissenting).

[10] Id. at 662 (Blackmun, J., dissenting).

[11] 490 U.S. 642 (1989). The majority in Wards Cove included Reagan appointees O'Connor, Scalia, and Kennedy.

First, the Court held that plaintiffs may no longer maintain a disparate-impact claim against a group of practices that together have a discriminatory impact. Instead, the majority required plaintiffs to isolate each specific employment practice contributing to the disparate impact, and prove that each practice has a significant disparate impact in and of itself. If the plaintiff is unable to do so, the disparate-impact claim will be dismissed - even if it is clear that a multi-factor employment practice discriminates against women and minorities. This requirement reversed numerous Supreme Court decisions and contradicted even the view of the Reagan Justice Department in Wards Cove itself.[14] Additionally, this rule rewards those employers that fail to maintain or destroy records containing the information needed by the plaintiffs; indeed, it was undisputed in Wards Cove that the employer did not preserve such records.

Second, the Court effectively overruled Griggs and numerous other decisions and shifted the burden of proving the business necessity of a discriminatory policy from the employer to the employee - a burden that is virtually insurmountable since only the employer usually has access to the information evidencing the legitimacy of or need for a discriminatory practice. To require discrimination victims to prove an issue that requires intimate knowledge of an employer's business operations is to erect yet another unwarranted hurdle for discrimination victims attempting to vindicate their claims.

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[12] Id. at 664 n.4 (Stevens, J., dissenting).

[13] Id. at 661 (Blackmun, J., dissenting).

[14] See brief for the United States as Amicus Curiae at 22 Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (No. 87-1387).

Finally, the Court went on to articulate a new definition of "business necessity" that "dilute[d] the 'necessity' in the 'business necessity' defense"[15] to such an extreme that many unnecessary discriminatory practices will be easy to maintain. Whereas under Griggs an employer could justify such practices only if they bore a "manifest relationship" to the employment at issue, the Wards Cove majority requires only that the employer show that the discriminatory practice "serves, in some significant way, the legitimate employment goals of the employer."[16] As even conservative Judge Richard Posner of the Seventh Circuit explained: "[T]he 'business necessity' defense [is] now a misnomer, since the 'defense' does not require a showing of necessity and is no longer an affirmative defense."[17] Thus, exclusionary employment practices that are not necessary for successful job performance were made permissible under Wards Cove - a result clearly at odds with the purpose of Title VII. As Justice Blackmun remarked: "One wonders whether the majority still believes that race discrimination" remains "a problem in our society, or even remembers that it ever was."[18]

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[15] Allen v. Seidman, 881 F.2d 375, 377 (7th Cir. 1989).

[16] Wards Cove, 490 U.S. at 659.

In the wake of Wards Cove, federal courts were forced to reverse discrimination findings and to retry cases under the new Wards Cove rules. For example, as a direct result of Wards Cove, appellate courts reversed verdicts finding that the city of Evanston's fire fighter physical agility test had a disparate impact on women[19] and that an FDIC promotion test had a discriminatory impact on African-Americans.[20] Several courts specifically noted that Wards Cove had "overruled the existing law" in disparate impact cases.[21] Wards Cove clearly had a significant negative impact on Title VII.

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[17] Allen, 881 F.2d at 377.

[18] 490 U.S. at 662 (Blackmun, J., dissenting).

[19] Evans v. City of Evanston, 881 F.2d 382, 385 (7th Cir. 1989).

[20] Allen v. Seidman, 881 F.2d 375, 381 (7th Cir. 1989). See also, e.g., Lu v. Woods, 717 F.Supp. 886 (D.D.C. 1989) (dismissing disparate impact promotion claim by Asian-American because of Wards Cove requirement of identification of precise practice causing discrimination).

2. Discriminatory Seniority Systems: the American Tobacco Decision

In American Tobacco Co. v. Patterson,[22] the Supreme Court carved out another exception to Title VII, holding that the law allows employers to adopt facially-neutral seniority systems that have a discriminatory impact on employees. Employers are now free to adopt discriminatory seniority systems as long as they do so in a covert way.

Until 1963, the American Tobacco Company openly discriminated on the basis of race with respect to every aspect of employment. It had segregated cafeterias, restrooms, lockers, and plant entrances, and it had assigned African-American employees to its lowest paying jobs. Responding to pressure regarding its discriminatory employment practices, in 1968 the company adopted a job progression and seniority system that, even though neutral on its face, entrenched its existing discriminatory practices. Both lower courts found that the seniority system violated Title VII, and rejected the claim that the system was legal under section 703(h) of Title VII, which immunizes pre-Title VII seniority systems from Title VII attack. The EEOC agreed that section

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[21] Hill v. Seaboard Coastline Railroad Co., 885 F.2d 804, 812 n. 12 (11th Cir. 1989). Accord, e.g., Allen, 881 F.2d at 377.

[22] 456 U.S. 63 (1982). The decision in American Tobacco was 5-4, with Justice O'Connor casting a deciding vote.

703(h) does not protect the post-Title VII adoption of seniority systems that have a disparate impact on minorities and women.

Rejecting both lower courts and the EEOC, however, the Supreme Court held 5-4 that section 703(h) protects seniority systems adopted both before and after the enactment of Title VII, and that American Tobacco could not be charged with discrimination. This was despite the fact that, as the dissent pointed out, the plain language of the law and its legislative history made clear that Congress merely intended to protect the expectations of employees who had vested seniority rights at the time Title VII was enacted.[23]

American Tobacco has immunized from Title VII challenge numerous seniority policies that would otherwise have been found discriminatory. For example, in Fire Fighters, Inc. for Racial Equality v. Bach,[24] the trial court found that the employment practices of the Denver Fire Department discriminated against African-Americans. After the American Tobacco case, however, the Tenth Circuit was forced to reverse the judgment because the district court had interpreted section 703(h) to immunize only those seniority systems adopted after Title VII.

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[23] For example, an interpretive memorandum introduced during the Senate debate on Title VII stated that: "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective." 110 Cong. Rec. 7213 (1964) (emphasis added). See American Tobacco, 456 U.S. at 83 & n.8 (Brennan, J., dissenting).

[24] 731 F.2d 664, 668 (10th Cir. 1984).

Similarly, in NAACP v. Detroit Police Officers Ass'n,[25] the Sixth Circuit reversed a judgment by a district court that found that the Detroit Police Department's layoff policy discriminated against African-American officers, relying on American Tobacco to conclude that the seniority system that authorized the layoffs was immunized from Title VII scrutiny, even though it had been adopted after Title VII's enactment.

3. Job Bias Overseas and by Foreign Companies: The Aramco and Quasar Decisions

Prior to the Supreme Court's decision in EEOC v. Arabian American Oil Co.("Aramco"),[26] it was clear to every federal court faced with the issue, as well as to the EEOC and the Department of Justice, that Congress intended that Title VII protect United States citizens employed by United States companies abroad.[27] In Aramco, however, the Supreme Court decided that Title VII does not apply to United States citizens working overseas for United States companies, thus denying to those citizens the right to be free from discrimination enjoyed by citizens employed in the United States.

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[25] 900 F.2d 903, 905 (6th Cir.), cert. denied, 111 S.Ct. 514 (1990).

[26] 111 S.Ct. 1227 (1991).

[27] See, e.g., Mas Marques v. Digital Equip. Corp., 637 F.2d 24 (1st Cir. 1980) (extraterritorial application not questioned); Seville v. Martin Marietta Corp., 638 F. Supp. 590, 592 (D.Md. 1986) (the Court adopted the logic of Bryant and Love v. Pullman in holding that Title VII extends to United States citizens working in West Germany); Bryant v. International School Services, Inc., 502 F. Supp. 472, 483 (D.N.J. 1980), rev'd on other grounds, 675 F.2d 562 (3rd Cir. 1982) (Title VII applied to employment practices of U.S. company in Iran); Love v. Pullman Co., 13 Fair Empl. Prac.
(continued...)

Refusing to defer to the contrary position taken by the EEOC and the Justice Department, the Supreme Court held 6-3 that Title VII does not apply overseas because Congress did not provide a "clear statement " to this effect.[28] As pointed out by the dissent, this exercise in judicial law-making ignored the express language of Title VII and well-settled principles of statutory construction, including even statutory construction argued by then-Assistant Attorney General Scalia in 1975 on behalf of the Justice Department.[29]

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[27] (...continued) Cas. (BNA) 423, 426 n. 4 (D.Colo. 1976), aff'd on other grounds, 569 F.2d 1074 (10th Cir. 1978) (U.S. citizens employed for U.S. company in Canada covered by Title VII); Fernandez v. Wynn Oil Co., 20 Fair Empl. Prac. Cas. (BNA) 1162 (C.D. Cal. 1979) (court ruled on the merits of a case involving discriminatory conduct applied to women seeking work in Latin America and Southeast Asia without questioning whether Title VII applies extraterritorially), aff'd, 653 F.2d 1273 (9th Cir. 1981).

[28] 111 S.Ct. at 1235-36. The majority included all the Reagan-Bush appointees to the Court (Scalia, Kennedy, O'Connor and Souter).

[29] See 111 S.Ct. at 1245 (Marshall, J., dissenting) (quoting Letter from W. Carey, EEOC General Counsel, to Senator Frank Church (March 14, 1975)); Foreign Investment and Arab Boycott Legislation, Hearings before the Subcommittee on International Finance of the Senate Committee on Banking, Housing and Urban
(continued...)

This new "clear statement" theory of statutory construction limits the extent to which United States citizens are protected from discrimination and exploitation abroad. Aramco's rationale already has been used by federal courts to deprive United States citizens injured overseas of the protections of the New York Human Rights Law[30] and the Federal Tort Claims Act.[31]

Recently, a federal court further narrowed Title VII to allow discrimination by a Japanese company against Americans based on national origin, by finding that the discrimination against three white, male employees of Quasar Company was allowed pursuant to a 1953 treaty.[32] In an opinion by Judge Richard Posner, the Seventh Circuit reversed a $2.5 million verdict awarded to the employees because they had been fired in 1986 due to their non-Asian national heritage. Despite factual findings by the lower court that

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[29] (...continued)
Affairs, 94th Cong., 1st Sess., 165 (1975). In particular, Scalia had argued that in order to give meaning to the alien exemption clause, which denies Title VII protection to foreign nationals employed by U.S. companies outside any state, it was necessary to interpret it as expressing Congressional intent to extend Title VII coverage to U.S. citizens employed abroad by U.S. companies.

[30] See Hammell v. Banque Paribus, 780 F.Supp. 196 (S.D.N.Y. 1991) (Aramco's "stringent criteria" to prove extraterritoriality not met).

[31] See Smith v. United States, 932 F.2d 791 (9th Cir. 1991) (Aramco dispositive in determining FTCA not applicable to wrongful death action overseas).

[32] See Fortino v. Quasar Co., 950 F.2d 389, 391 (7th Cir. 1991).

the discrimination was based on national origin, the appellate court held that the discrimination was instead based on the employees' citizenship, and thus allowable under the 1953 treaty. One expert on such discrimination has already noted that this decision, if followed elsewhere, may require amendment of Title VII to prevent such bias against Americans.[33]

4. Gender Harassment in the Workplace: The Meritor and Related Decisions

In its attempt to prohibit all forms of employment discrimination, Title VII used broad language to outlaw discrimination not just in hiring or firing, but with respect to the "terms, conditions or privileges" of employment. Thus, it was recognized by the courts in the 1970s that harassing treatment based on race, religion, or national origin violated Title VII.[34] In the early 1980s, the courts similarly recognized that Title VII prohibited harassment based on gender.[35] Yet, even as the Supreme Court acknowledged this principle in Meritor Savings Bank v. Vinson,[36] the majority crafted so many exceptions and limitations to the prohibition that, in combination with lower court decisions, particularly by Reagan-Bush judges, blatant and hostile discrimination against women has continued.

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[33] See ABA Journal (March 1992) at 72.

[34] See, e.g., Firefighters Institute for Racial Equality v. St. Louis, 549 F.2d 506, 514-15 (8th Cir.) cert. denied, 434 U.S. 819 (1977); Cariddi v. Kansas City Chiefs Football Club, 568 F.2d 87 (8th Cir. 1977) (ethnic origin).

[35] See, e.g., Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

[36] 477 U.S. 57 (1986).

Meritor arose out of a gender harassment claim brought by Mechelle Vinson, who presented evidence that her supervisor abused her verbally, fondled her breasts in front of other employees, followed her into the women's room where he exposed himself and on several occasions forcibly raped her.[37] In holding that this type of "hostile environment" was unlawful under Title VII, the Supreme Court also suggested that Title VII permits a certain amount of abusive treatment and held that a violation occurs only if the victim can prove that the abuse was sufficiently severe to alter the condition of her employment.[38] The Court went on to state that relevant to this "factual" inquiry was whether the harassment was "unwelcome,"[39] directing lower courts to make this determination "on the totality of the circumstances," focusing even on the victim's attire, speech and sexual fantasies.[40]

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[37] 477 U.S. at 60.

[38] Id. at 67.

[39] The Court stated that "The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome" and that "The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome...." Id. at 68.

[40] Id. at 68-69.

The Court majority then adopted the position of the Reagan Justice Department and the EEOC, chaired by now-Justice Clarence Thomas, and held that, unlike cases of hostile environment harassment based on race, religion or national origin, proof of a hostile environment based on gender by supervisory personnel does not automatically establish a violation by the employer of Title VII. Ignoring EEOC guidelines promulgated during the Carter administration[41] and the intent of Congress that discrimination based on gender be treated as seriously as discrimination based on race,[42] the Court explicitly rejected a standard of strict employer liability and failed to delineate any specific standard of employer liability.[43] In a concurring opinion, Justice Marshall and three other justices criticized the majority for failing to make clear the standard of employer liability and maintained that just as in race bias cases, an employer should generally be liable for a supervisor's conduct in creating a discriminatory environment, regardless of whether there was actual notice to the employer.[44]

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[41] See 45 Fed. Reg. 74676 (1980).

[42] See H.R. Rep. No. 92-238, 92d Cong., 1st Sess., 5 ("This Committee believes that women's rights are not judicial divertissments. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination.").

[43] 477 U.S. at 72.

As a result of the limited protection against harassment according to Meritor and the later decisions of the lower courts, women have been subjected to extreme and outrageous prejudice and harassment in the work place without effective remedy. For example, in Rabidue v. Osceola Refining Co.,[45] Vivienne Rabidue, the only female manager working for Osceola Refining Company, alleged that she had been harassed on the basis of her gender by virtue of what the dissenting judge called an "abusive, anti-female environment,"[46] which was characterized by "misogynous language," pornographic posters and general "anti-female animus."[47] The supervisors at Osceola "regularly spewed anti-female obscenity," referring to women as "cunt," "pussy," "whore" and "tits," while other male employees hung pictures of naked women in objectifying poses, one of which showed a prone woman who had a golf ball on her breasts with a fully-clothed man standing over her, golf club in hand, yelling "Fore."[48] Of Ms. Rabidue, supervisor Doug Henry remarked "All that bitch needs is a good lay" and that she was a "fat ass."[49] Ms. Rabidue was not given the fringe benefits accorded to male managers and was not allowed to take male clients to lunch because she "might have car trouble on the road,"[50] leading one supervisor to lament that this was why they "really needed a man" to fill her position.[51] When Ms. Rabidue complained that this environment was offensive to her and to other women who had come to her with their complaints, she was belittled and undermined. She eventually was fired due to what the company said was her offensive personality, and encouraged to go back to being a secretary.

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[44] Id. at 74-78. Five justices, including Reagan appointee Justice O'Connor, refused to join Justice Marshall's opinion and rejected general employer liability.

[45] 805 F.2d 611 (6th Cir. 1986), cert. denied, 418 U.S. 1041 (1987).

[46] Id. at 626 (Keith, J., dissenting).

[47] Id. at 625.

[48] Id. at 623-24.

Analyzing Osceola's work environment under the Meritor test, however, the court of appeals majority concluded that the workplace was not sufficiently hostile and unwelcome to affect the psychological well-being of a "reasonable person."[52] According to the majority, Ms. Rabidue had somehow voluntarily subjected herself to the work environment which, the majority boldly suggested, generally mirrored society as a whole.[53]

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[49] Id. at 624.

[50] Id.

[51] Id.

[52] Id. at 622.

[53] Id.

Judge Keith, the only non-Reagan appointee on the panel, strongly dissented:

> In my view, Title VII's precise purpose is to prevent such behavior and attitudes from poisoning the work environment of classes protected under the Act. To condone the majority's notion of the "prevailing workplace" I would also have to agree that if an employer maintains an anti-semitic workforce and tolerated a workplace in which "kike" jokes, displays of nazi literature and anti-Jewish conversation 'may abound,' a Jewish employee assumes the risk of working there, and the court must consider such a work environment as 'prevailing.' I cannot. ... As I believe no woman should be subjected to an environment where her sexual dignity and reasonable sensibilities are visually, verbally or physically assaulted as a matter of male prerogative, I dissent.[54]

Likewise, Judge Keith refused to adopt the perspective that a totality of the circumstances inquiry must focus on society's prevailing mores to decide whether a woman's well-being is affected enough to state a claim:

> 'Society' in this scenario must primarily refer to the unenlightened; I hardly believe reasonable women condone the pervasive degradation and exploitation of female sexuality perpetuated in American culture. In fact, pervasive societal approval thereof and of other stereotypes stifles female potential and instills the debased sense of self worth which accompanies stigmatization. The presence of pin-ups and misogynous language in the workplace can only evoke and confirm the debilitating norms by which women are primarily and contemptuously valued as objects of male fantasy. That some men would condone and wish to perpetuate such behavior is not surprising. However, the relevant inquiry at hand is what the reasonable woman would find offensive, not society, which at one point condoned slavery.[55]

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[54] Id. at 626.

[55] Id. at 627.

Meritor's de minimis exception has similarly left numerous other victims of egregious discrimination unredressed.[56] For instance, a district court concluded that even if Kathleen Neville's supervisor had grabbed and kissed her while driving on a business trip, put his hands around her waist and commented on her dress, pressed his leg up against hers under the table at a business dinner, and regularly pressed his body against her back or her chair so that she had to move her desk to a more public place, the behavior was "disquieting" but not sufficiently abusive to constitute illegal harassment under Meritor.[57]

Additionally, Meritor's directive to focus on the plaintiff's behavior to determine whether the harassment was "unwelcome" has led courts to permit even outrageous workplace harassment. For instance, Karen Weinsheimer's work environment was not deemed "unwelcome" despite the fact that one male employee at Rockwell repeatedly asked her to "suck him" and "give him head," pointed to her crotch and said "Give me some of that stuff," grabbed her breast and her crotch on several other occasions, held a knife to her throat, pushed her into a filing cabinet, and threatened to "bang her head into the ground," while another employee exposed his penis and placed it in her hand while she was looking away and a third patted her on the buttocks and requested an "ice-cube job" (referring to a variation of oral sex). Instead, the court held that because Ms. Weinsheimer participated in an environment replete with sexual innuendo, joke telling and general vulgarity, the abusive actions of the male employees could not be unwelcome or hostile.[58] The judge relied on the defendant's testimony that Ms. Weinsheimer's arguments with her boyfriend over the phone at work involved obscene language to conclude that she "was equally proficient in the[] use of crude language,"[59] and therefore that the abuse visited upon her by her male co-workers "grew out of work or personal issues" rather than "sexual animus."[60]

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[56] Additionally, this exception has been applied to hostile environments based on race. See,e.g., Kishaba v. Hilton Hotels Corp., 737 F.Supp. 549, 555 (D.Hawaii 1990).

[57] Neville v. Taft Broadcasting Co., 42 Fair Empl. Prac. Cas. (BNA) 1314, 1317 (W.D.N.Y. 1987). See also, e.g., Christoforou v. Ryder Truck Rental, Inc., 668 F.Supp. 294, 298-301 (S.D.N.Y. 1987) (ruling that no hostile work environment was created under Meritor even assuming that supervisor had, inter alia, continually asked out employee despite her refusals, placed his hand on her breast and buttocks on various occasions, pinned her against the wall, and made lewd remarks and tried to kiss her).

Finally, the Supreme Court's rejection of strict employer liability has harmed numerous other victims of gender harassment. In Valdez v. Church's Fried Chicken, Inc.,[61] for example, the court held that Belinda Valdez did not state a claim against her employer under Title VII, even though she proved that on separate occasions a supervisory employee rubbed up against her and fondled her breasts, pulled out his penis and attempted to force her to engage in oral copulation, and pulled down her pants in the women's room and attempted to rape her. In fact, the court specifically found that she had suffered assault and harassment, including attempted rape. But because the court ruled that notice to the employer was required and did not credit her testimony that she had notified her superiors but that they "'cut her short'" and "were not interested in any details of sexual harassment," it concluded that she had not stated a claim against her employer under Meritor.[62]

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[58] Weinsheimer v. Rockwell Int'l Corp., 754 F.Supp. 1559, 1564 (M.D.Fla. 1990), aff'd, 949 F.2d 1162 (11th Cir. 1991).

[59] Id. at 1565.

[60] Id.

[61] 683 F.Supp. 596 (W.D.Tex. 1988).

5. Congressional Efforts to Remedy the Damage Done by the Reagan-Bush Courts

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[62] Id. at 620. See also, e.g., Swentek v. USAir, Inc., 830 F.2d 552, 557-58 (4th Cir. 1987) (opinion by Judge J. Harvie Wilkinson) (hostile environment victim must notify employer and show employer failed to take prompt remedial action in order to state claim under Title VII); Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 308-09 & n.3 (5th Cir. 1987) (opinion by Judge Edith Jones) (reversing award of $25,000 for plaintiff on grounds that employer response was sufficient and noting that harassment was not "aggressive" or "threatening," even though harasser had put his hands on victims hips and dropped his pants, touched her breasts, and stated "let's get naked and go to my room"); Jones v. Flagship Int'l, 793 F.2d 714, 719-20 (5th Cir. 1986). Even when the victim does notify her employer, the employer is not required to eradicate the discrimination from the workplace, but merely to take steps "reasonably calculated" to address the situation. See Brooms v. Regal Tube Co., 881 F.2d 412, 421 (7th Cir. 1989) ("court should not focus solely upon whether the remedial activity ultimately succeeded, "but whether activity was reasonable response); see Swentek, 830 F.2d at 558; Tunis v. Corning Glass Works, 747 F.Supp. 951, 959 (S.D.N.Y. 1990).

As commentators have noted, it is extremely difficult and time consuming, and diverts attention from other legislative matters, for Congress to pass legislation overturning court decisions that contravene civil rights laws.[63] Nevertheless, Congress was able to enact the Civil Rights Act of 1991 to undo some of the damage done by Reagan-Bush courts to Title VII, focusing specifically on Supreme Court decisions in 1989-91.

In particular with respect to Title VII, the 1991 Act sought to overrule Aramco and Wards Cove and restore the Griggs rule.[64] The Act was the result of compromises with the Bush Administration, and even as to these decisions, it may not provide a full remedy; for example, the Act expressly provides that the overruling of Aramco does not apply to pending discrimination cases, and there have been conflicting decisions as to applicability to pending cases of other parts of the Act as well. Whether the Reagan-Bush courts will interpret the law to fully restore the Griggs rule also remains in question. In addition, many bias and harassment victims continue to suffer as a result of the damage to Title VII produced by the limitations in American Tobacco, Meritor, and numerous lower court decisions. The Reagan-Bush courts have clearly weakened the protections against job bias of Title VII.

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[63] See W.J. Moore, In Whose Court?, National Journal 2396, 2397-98, 2400-01 (Oct. 5, 1991).

[64] In addition, the 1991 Act sought to overrule one aspect of the decision in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), where the Court suggested that an employer could escape Title VII liability altogether by proving that even if race, sex, or other prohibited factors played a role in a decision to fire an employee, for example, the employee would have been fired anyway for non-discriminatory reasons. Lower courts had interpreted Price Waterhouse to permit even blatantly racist or sexist behavior against employees where other, non-discriminatory reasons were also available to support a job decision. See, e.g., EEOC v. Alton Packaging Co., 901 F.2d 920, 925 (11th Cir. 1990); Pajic v. Cigna Corp., 56 FEP Cas. (BNA) 1628, 1638 (E.D. Pa. 1990). The 1991 Act requires that an employer be held liable if bias was a motivating factor in a job decision, but limits the relief available to such a bias victim, in accord with pre-Price Waterhouse cases. See, e.g., Bibbs v. Block, 778 F.2d 1318, 1324 (8th Cir. 1985). See also discussion of 1991 Act infra re: other Reagan-Bush court decisions.

B. The Civil Rights Act of 1866

The Civil Rights Act of 1866, particularly 42 U.S.C. § 1981, has proven to be one of the nation's most effective employment discrimination laws. Protecting employees from intentional race discrimination, section 1981 applies to all employers regardless of size, redresses injuries caused by the pain and suffering attendant to discrimination, and provides a remedy of punitive damages for particularly egregious cases.[65] Since it was enacted, section 1981 has been interpreted by all the federal circuits to prohibit all forms of race discrimination with respect to contracts and employment.[66] Thus, until the Supreme Court's announcement in 1989, section 1981 prohibited race discrimination in hiring, firing, and salary and promotion decisions, as well as harassment based on race.

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[65] In these respects, section 1981 provides greater protection to victims of race discrimination than Title VII as it was originally written. Although the Civil Rights Act of 1991 provides for the first time damages under Title VII, these damages are capped and Title VII continues to leave unprotected victims employed at businesses with fewer than 15 employees; such businesses, it is estimated, employ over 11 million persons.

1. Limiting the Scope of Section 1981: The Patterson Decision

The Court's decision in Patterson v. McLean Credit Union,[67] carved out a huge exception to section 1981 by concluding that its prohibitions on discrimination only apply to the "making and enforcing of contracts." Brenda Patterson, an African-American woman, contended that she was harassed, not promoted and then fired by the McLean Credit Union because she was an African-American. She alleged that she had been given more work than her white counterparts, assigned menial tasks, singled out and publicly criticized at meetings, and told by her supervisor that "blacks are known to work slower than whites by nature."[68] The lower courts dismissed the claim and ruled, in contrast to most lower courts, that a claim for racial harassment is not actionable under section 1981.

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[66] See, e.g., Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 201-03 (1st Cir. 1987) (section 1981 applied to training, wages, and discharge); Richards v. New York City Bd. of Educ., 668 F. Supp. 259, 267 (S.D.N.Y. 1987) (section 1981 applied to promotions), aff'd without opinion, 842 F.2d 1288 (2d Cir. 1988); Liotta v. National Forge Co., 629 F.2d 903, 906-07 (3d Cir. 1980) (discriminatory discharge claim), cert. denied, 451 U.S. 970 (1981); Patterson v. American Tobacco Co., 535 F.2d 257, 263 (4th Cir. 1976) (discriminatory promotion practices); Hernandez v. Hill Country Tel. Coop., Inc., 849 F.2d 139, 142-44, (5th Cir.), (section 1981 applied to promotion), reh'g. denied, 853 F.2d 925 (1988); Grubb v. W.A. Foote Memorial Hosp., Inc., 533 F. Supp. 671, 675-76 (E.D. Mich. 1981) (discriminatory discharge claim), aff'd, 759 F.2d 546 (6th Cir.), cert. denied, 479 U.S. 946 (1985); Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1424 (7th Cir. 1986) (racial harassment claim); Taylor v. Jones, 653 F.2d 1193, 1200 (8th Cir. 1981) (racial harassment, pervasive use of racist slurs); Satterwhite v. Smith, 744 F.2d 1380, 1383 (9th Cir. 1984) (discriminatory working conditions).

[67] 491 U.S. 164 (1989).

The Supreme Court affirmed, but went even further. The 5-4 Court majority held that section 1981's protection from non-discrimination "extends only to the formation of a contract, but not to problems that may arise later from conditions of continuing employment."[69] Under this narrow construction, section 1981 only applies to discrimination in hiring, and not to firing, refusal to promote, or harassment based explicitly on race.[70]

As the dissent pointed out, the unduly formalistic interpretation of the statute adopted by the majority makes little sense when considered against the backdrop of what Congress intended at the time of section 1981's enactment. The legislative history of section 1981 clearly indicates that Congress enacted the statute to not only protect freed African-Americans from refusals to contract for jobs and from arbitrary dismissals, but also from onerous working conditions.[71] Moreover, racial harassment after the formation of an employment relationship is, in many cases, evidence that people of color do not enjoy the same right to contract as whites, and thus there is no basis for a distinction between "the making of a contract" and the equal right to enjoy the benefits of that contract.[72] The decision in Patterson, written by Justice Kennedy and joined by the other Reagan appointees to the Court, clearly contradicted past precedent and harmed civil rights.

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[68] 491 U.S. at 213 (Brennan, J., dissenting).

[69] 491 U.S. at 176.

[70] Id. at 177.

The effect of Patterson has been devastating for numerous victims of race discrimination. At least 200 section 1981 claims involving race discrimination in promotion, demotion, discharge and conditions of employment were dismissed in the eight months following the Patterson decision.[73] Moreover, many damage awards were literally taken away from victims who already had proven a violation of section 1981 under a pre-Patterson interpretation.

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[71] 491 U.S. at 206. (Brennan, J., concurring in part and dissenting in part).

[72] Id. at 207-208.

[73] See NAACP Legal Defense and Educational Fund, Inc., The Impact of Patterson v. McLean Credit Union, (Nov. 20, 1989). The Fund later reported that an additional 105 cases were dismissed under Patterson through February 23, 1990. See Hearings on H.R. 4000 before the House Committee on Education and Labor and Subcomm. on Civil and Constitutional Rights, 101st Cong., 2d Sess., at 160-165 (March 9, 1990 letter from Julius L. Chambers plus attachment).

For example, in Carroll v. General Accident Insur. Co. of America,[74] the Fifth Circuit relied on Patterson to deprive Patricia Carroll of a $145,000 verdict awarded to her for the pain, suffering and physical and emotional distress caused by her employer's racial harassment. Similarly, in Sherman v. Burke Contracting, Inc.,[75] the Eleventh Circuit reversed $12,000 of a $22,000 jury verdict awarded to an African-American man discharged twice by white male employers because they did not like that he was married to a white woman.

Patterson also deprived hundreds of victims of race discrimination of their day in court. For instance, in Brooms v. Regal Tube Co.,[76] an African-American employee alleged that she had been subjected to unrelenting racial harassment by her supervisor. He had repeatedly made hostile remarks to Ms. Brooms, and at one point showed her photocopies of pornographic pictures involving women of color engaged in bestiality. Having previously remarked that black women had historically borne white men's babies, he threatened that the pictures depicted how she was "going to end up" and then grabbed her and threatened to kill her if she would not have intercourse and engage in sodomy with him. In her attempt to flee from Gustafson, Ms. Brooms fell down a flight of stairs. Nevertheless, the Seventh Circuit dismissed the action, reasoning that it was foreclosed by Patterson.[77]

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[74] 891 F.2d 1174, 1177 (5th Cir. 1990).

[75] 891 F.2d 1527 (11th Cir.), cert. denied, 111 S.Ct. 353 (1990).

[76] 881 F.2d 412, 424 (7th Cir. 1989).

Similarly, in Leong v. Hilton Hotels,[78] an Hawaiian woman of Asian descent alleged that her employer exhibited an intense hatred of people of color, making racist comments such as calling Japanese workers "Japs" and "coolies" and remarking that all Hawaiians tended to be lazy and slow. Relying on Patterson, the district court dismissed her claim. By drastically narrowing the scope of application of section 1981, the Court majority thus denied relief to plaintiffs with legitimate postcontractual discrimination cases.[79]

2. Limiting Governmental Liability for Race Discrimination: Jett and Related Decisions

Even as the Supreme Court narrowed section 1981 in Patterson, it seemed clear that the statute protected citizens from race discrimination perpetrated by state or local governments.[80] Yet in Jett v. Dallas Independent School District,[81] a 5-4 Supreme Court majority carved out yet another exception to the already-eviscerated statute to rule that it does not provide for a private cause of action for governmental discrimination based on race. Instead, the Court held that a discrimination victim's sole means of redress in this situation was section 42 U.S.C. § 1983. Yet the Reagan-Bush Court had severely limited section 1983, concluding that it provided no protection from abuse by state governments,[82] [required plaintiff to shoulder near-impossible evidentiary burdens], and immunized from liability numerous government actors.[83]

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[77] Id. at 424.

[78] 50 Fair Empl. Prac. Cas. (BNA) 738 (D.Haw. 1989). After her claim was dismissed under Patterson, the plaintiff in Leong brought a claim for race harassment under Title VII, which claim was promptly dismissed under Meritor. See also, e.g., Mason v. Coca-Cola Bottling Co., 52 Fair Empl. Prac. Cas. (BNA) 276, 278 (D. Kan. 1989) (section 1981 claim dismissed even though defendant conceded that plaintiff's co-workers had frequently used racial epithets); Dangerfield v. Mission Press, 50 Fair Empl. Prac. Cas. (BNA) 1171, 1176 (N.D. Ill, 1989) (section 1981 claim based on race harassment dismissed); Foster v. Atchison, T. & S.F. Ry. Co., No. 88-4085-S, 1990 U.S. Dist. LEXIS 1338 (D. Kan. 1990) (relying on Patterson, court dismissed race harassment claim); Miller v. Shawmut Bank of Boston, N.A., 726 F.Supp. 337, 340 (D. Mass. 1989) (relying on Patterson, court dismissed racial harassment claim).

[79] 50 Fair Empl. Prac. Cas. (BNA) at 741.

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[80] See Jett v. Dallas Independent School District, 109 S. Ct. 2702, 2727-28 (1989) (Brennan, J., dissenting).

[81] 109 S. Ct. 2702 (1989).

[82] See Will v. Michigan Department of State Police, 491 U.S. 58 (1989) (5-4 holding, joined by all Reagan appointees, ruling that 42 U.S.C. § 1983 does not apply to discrimination by state governments and agencies, despite history of post-Civil War civil rights laws as directed against state civil rights violations).

[83] See City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) (municipalities immune from liability for illegal acts of employee unless plaintiff can show employer had "final policymaking authority" or acted pursuant to municipal policy, discernible by reference to local laws, regardless of whether employee possessed authority in fact; Brennan/Marshall concurrence charged plurality with adopting theory of liability that would "permit municipalities to insulate themselves from liability for the acts of all but a small minority of actual policymakers"); see also Carrero v. New

(continued...)

The dissenters branded the Court's holding "nothing short of astonishing," finding it "[s]trange indeed, simultaneously to question whether § 1981 creates a cause of action on the basis of private conduct (Patterson) and whether it creates one for governmental conduct (this case) -- and hence to raise the possibility that this landmark civil rights statute affords no civil redress at all."[84] In combination with Patterson, Jett "virtually wiped the statute off the books as it applies to employment discrimination."[85]

3. Congressional Effort to Remedy the Damage Done by the Reagan-Bush Courts

The 1991 Civil Rights Act overruled the Court's holding in Patterson, explicitly defining the term "make and enforce contracts" to include "the making, performance, modification, and termination of contracts," and the enjoyment of all of their benefits. Even as to Patterson, however, the courts have not yet determined whether the Act's remedy will

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[83] (...continued) York City Housing Authority, 890 F.2d 569, 577 (2d Cir. 1989) (victim of gender harassment including repeated touching and kissing and public humiliation by supervisor failed to state claim against municipality under § 1983 because supervisor's action not attributable to municipal policy); Starrett v. Wadley, 876 F.2d 808 (10th Cir. 1989) (victim failed to state claim against municipality under § 1983 for gender harassment by supervisor, including asking victim to have intercourse with him, making "obscene gestures" and pinching her on buttocks because supervisor, although County Assessor, did not act pursuant to municipal authority).

[84] 109 S. Ct. at 2724 (Brennan, J., dissenting) (emphasis added).

[85] Charles Stephen Ralston, NAACP Legal Defense Fund memorandum (June 27, 1989).

apply to pending cases, jeopardizing perhaps hundreds of bias victims. In addition, the damage done by Will, Jett, and other cases continues to weaken the Civil Rights Act.

C. Section 5 of The Voting Rights Act of 1965

The Voting Rights Act of 1965 was a key Congressional remedy for decades of discrimination by states and localities against people of color. Section 5 of the Act requires governments in certain states with a history of voting discrimination to submit for Justice Department review and preclearance any proposed changes in "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting,"[86] thereby helping to prevent continued discrimination in this area.

Prior to the 1980s, the Supreme Court had interpreted the provisions of the Act in accordance with the intent of Congress to eliminate all discrimination related to voting, recognizing that states might attempt to discriminate against people of color in a number of imaginative ways and concluding that the Act was meant to be broadly applied to prevent such conduct.[87] In 1971, the Justice Department accordingly adopted rules making clear that changes such as those that made an elected official a mere figurehead by transferring decisionmaking authority to an appointed official or a group of elected officials controlled by a different electorate were subject to section 5 review.

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[86] 42 U.S.C. § 1973c (1988).

[87] See Allen v. State Board of Elections, 393 U.S. 544, 565-66 n. 30, 566 (1969) (stating that "[t]he legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way.") (emphasis added)

In the companion cases of Presley v. Etowah County Commission and Mack v. Russell County Commission,[88] however, the Court held, contrary to the position of most lower courts and even the Bush Justice Department, that Section 5 did not require Alabama county officials to pre-clear changes to reduce the authority of newly-elected African-American County Commissioners. In both cases, the white majority of the Commission had acted to remove individual Commissioner power, which would otherwise have been exercised by a newly elected African-American official, and effectively concentrated that power in the entire Commission, where whites still controlled by a majority. In both cases, the first-ever African-American Commissioners had been elected from districts created by consent decrees ending at-large voting systems designed by state officials to dilute African-American voting power. For the first time ever, the Court majority -- which included all five Reagan-Bush appointees plus Chief Justice Rehnquist -- rejected the Justice Department's interpretation of the Voting Rights Act and ruled that section 5 did not apply to this subtle, yet effective, discriminatory ploy to shut out the voice of the disempowered in government. In doing so, the Court at once eviscerated the effectiveness of the Act and created a virtual blueprint for its continued evasion by racist officials who seek to do so.

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[88] 60 U.S.L.W. 4135 (U.S. Jan. 27, 1992).

D. Title IX of the Education Amendments of 1972

The Supreme Court also severely limited the scope of Title IX of the Education Amendments of 1972, which forbids gender discrimination in education,[89] holding in Grove City College v. Bell[90] that it permitted gender discrimination in schools receiving federal financial assistance, unless it could be proven that the federal funds were directly funneled to the program in which the discrimination was perpetrated.[91] Although Grove City College did not participate in federal educational aid programs, some of its students were able to attend by virtue of their receipt of federal financial assistance through the school's financial aid department. Grove City maintained that the receipt of these federal funds did not require it to avoid gender discrimination. The Department of Education disagreed and initiated proceedings to declare Grove City and its students ineligible to receive federal financial assistance. Grove City and four of its students sued.[92]

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[89] Education Amendments of 1972 § 901(a), Pub. L. 92-318, 86 Stat. 373, 20 U.S.C. § 1681 (a).

[90] 465 U.S. 555 (1984).

[91] Id. at 573.

[92] 465 U.S. at 560-61.

While acknowledging that Grove City was the recipient of federal financial assistance through grants given to its students, the Court majority held that only the financial aid program of Grove City was subject to the prohibitions of Title IX.[93] Finding that the majority's construction of the statute was "directly contrary to congressional intent," the dissent concluded that "the Court completely disregards the broad remedial purposes of Title IX that consistently have controlled our prior interpretations of this civil rights statute."[94]

After several years of legislative struggle, Congress sustained the dissent's view by passing the Civil Rights Restoration Act of 1987. The Act made clear that Title IX was intended to apply to entire institutions, even if only one or a few individual programs benefitted from federal funding, and prevented additional future damage from the Grove City decision.

II. Reagan-Bush Court Restrictions on Access to the Courts to Stop Discrimination

A. Statutes of Limitation

Another method by which the Reagan-Bush courts have diluted the effectiveness of our civil rights statutes has been to interpret them in such a way as to make access to the law for victims of discrimination increasingly difficult. Until the Supreme Court's decision in Lorance v. AT&T Technologies, Inc.,[25] a victim of discrimination could bring a Title VII action up to 300 days after any application of an employment policy that discriminated against the employee. This "continuing violation" theory was grounded in the common-sense notion that each act in furtherance of the policy was discriminatory in itself and an adequate basis for a claim. Thus, under this theory, the statute of limitations begins to run anew each time it is applied.[26]

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[93] 465 U.S. at 573-74.

[94] Id. at 583 (Brennan, J., dissenting).

In Lorance, female employees of AT&T alleged that they had been demoted from their positions pursuant to a seniority system that was deliberately adopted to prevent women from applying for higher paying, traditionally male jobs. The Supreme Court ruled that the claim should be dismissed on statute of limitations grounds because the system had been adopted in 1979, even though it was not applied to Ms. Lorance and other plaintiffs until several years later. According to the majority, initial adoption of the policy triggered the limitations period.[97]

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[25] 490 U.S. 900 (1989). The 5-3 decision in Lorance was written by Justice Scalia and joined in by Justice Kennedy; Justice O'Connor did not participate.

[26] See, e.g., Perez v. Laredo Junior College, 706 F.2d 731, 733-34 (7th Cir. 1983)("if the statutory violation occurs as a result of a continuing policy, itself illegal, then the statute does not foreclose an action aimed at the company's enforcement of the policy within the limitations period"), cert. denied, 464 U.S. 1042 (1984); Cook v. Pan Am. World Airways, Inc., 771 F.2d 635, 646 (2d Cir. 1985) (statute of limitations begins to run at the "last discriminatory act in furtherance" of "continuous practice and policy of discrimination") cert. denied, 474 U.S. 1109 (1986); McKenzie v. Sawyer, 684 F.2d 62, 72 (D.C. Cir. 1982) (action not time barred if one of the related acts falls within the limitations period).

As Justice Marshall made clear in his dissent, under the majority's construction, the statute of limitations begins to run on a claim against a discriminatory seniority system on the day it is adopted, "even if the employee who subsequently challenges the system could not reasonably have expected to be demoted or otherwise concretely harmed by the new system at the time of its adoption, and, indeed, even if the employee was not working in the affected division of the company at the time of the system's adoption."[98] Even the Justice Department characterized this result as anomalous:

> The employee ... is faced with a Hobson's choice either to bring what may be an unnecessary and premature lawsuit against [the] employer, to the detriment of the employment relationship, or to forego any possibility of recovery in the event that the plan ever should operate to injure [her or] him."[99]

As the Justice Department concluded, "it cannot be supposed that Congress intended such a bizarre result."[100]

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[97] The 5-4 majority in Lorance included all three Reagan appointees (Scalia, Kennedy, and O'Connor).

[98] 490 U.S. at 913-14 (Marshall, J., dissenting).

[99] Brief for the United States as Amicus Curie at 24, Lorance v. AT&T Technologies, 490 U.S. 900 (1989) (No. 87-1428).

[100] Id. at 23.

Although Lorance concerned challenges to discriminatory seniority policies under Title VII, lower courts have broadened the blanket of immunity created by this decision and applied its rationale to non-seniority discriminatory policies as well.[101] For example, in Hamilton v. 1st Source Bank,[102] the Fourth Circuit used the Lorance rule to reverse a $114,000 verdict awarded by a jury that found illegal discrimination in violation of the Age Discrimination in Employment Act.[103] Similarly, one court extended the holding of Lorance in Beavers v. American Cast Iron Pipe Co.[104] to dismiss as untimely Title VII claims brought by male employees alleging that the company's benefits policy discriminated against them because they were male. Lorance has also been applied to claims involving discriminatory promotion policies[105] under Title VII, and to a pay reduction plan under the Fair Labor Standards Act.[106]

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[101] See EEOC v. City Colleges, 740 F. Supp. 508, 515 (N.D. Ill. 1990) ("[Lorance's] rationale applies with equal force to the challenge of all employment plans or systems."), aff'd, 944 F.2d 339 (7th Cir. 1991).

[102] 928 F.2d 86, 90 (4th Cir. 1990).

[103] 29 U.S.C. 621-34 (1988). Other courts also have applied the Lorance rule to ADEA cases: See, e.g., Chambers v. Parco Foods, Inc., 935 F.2d 902, 905-06 (7th Cir. 1991) (rev'd on other grounds, 935 F.2d 1407 (3rd Cir.), cert. denied, 112 S.Ct. 379 (1991); Colgan v. Fisher Scientific Co., 747 F. Supp. 299, 303 (W.D. Pa. 1990).

[104] 751 F.Supp. 956, 960 (N.D. Ala. 1990).

Congress partially addressed the problems created by Lorance in the Civil Rights Act of 1991 by effectively overruling the decision with respect to seniority systems. The Act does not address the application of the Lorance rationale to statutes other than Title VII and systems other than those regulating seniority, however, which have become increasingly serious as more courts have employed Lorance. The problems created by Lorance may well continue to be a serious problem for years to come.

B. Standing

Traditionally, plaintiffs have had standing to sue for redress of their injuries so long as they met the constitutional standing demands of Article III itself and did not raise any so-called prudential concerns.[107] These prudential concerns are judicially-created -- not constitution-based -- limitations on standing to sue.[108] In recent years, however, the Reagan-Bush courts have relied heavily on both a restrictive reading of the Article III requirements and an expanded category of prudential concerns to deny access to civil rights laws. In fact, a recent study indicates that "Carter judges are four times more likely than Reagan appointees to grant standing to public interest groups," with Reagan appointees "slamm[ing] the courtroom door on civil rights groups, environmentalists and labor unions far more often than they did on corporations or the federal government."[109] In several areas in particular, Reagan-Bush judges have denied access to the courts to attempts to redress discrimination and related claims.

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[105] Malhotra v. Cotter Co., 885 F.2d 1305 (7th Cir. 1989), cert. denied., 112 S.Ct 379 (1991); Davis v. Boeing, 56 Fair Empl. Prac. Cas. (BNA) 284, 285 (E.D. Pa. 1990.)

[106] Hendrix v. Yazoo City, 911 F.2d 1102, 1104 (5th Cir. 1990) (fire fighters required to bring challenge to pay reduction scheme within three years of date of enactment; each paycheck did not amount to new violation).

[107] See, e.g., Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978); Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977); Warth v. Seldin, 422 U.S. 490 (1975). The constitutional standing requirements are that the plaintiff personally suffered some actual or threatened injury that was 1) real and immediate; 2) fairly traceable to the defendant's putatively unlawful conduct; and 3) likely to be redressed by a favorable judicial decision.

1. Halting Challenges to Unconstitutional Government Policies: The Lyons Decision

In Los Angeles v. Lyons,[110] the Supreme Court rewrote constitutional standing doctrine to effectively immunize from the equitable powers of the court governmental policies that authorize constitutional violations. A divided Court denied Adolph Lyons standing to sue for an injunction prohibiting the Los Angeles Police Department from using illegal chokeholds. Although Lyons had previously suffered permanent larynx damage from a chokehold so severe that he blacked out, urinated and defecated before coming to in a pool of his own blood and vomit, the Supreme Court deemed this past injury insufficient to satisfy the constitutional standing requirement that the injury be "real and immediate."[111] Absent continuing adverse effects, the majority held, past exposure to illegal conduct suggested merely hypothetical exposure to similar harmful conduct in the future.[112] Not only would Lyons again have to be stopped by an LAPD officer, but that officer would have to apply an illegal chokehold.[113] The majority seemed swayed in part by a belief that Lyons' likelihood of being choked depended in large measure on Lyons' own behavior; that is, if Lyons behaved himself, his risk of harm from illegal chokeholds would be virtually nonexistent. As the strongly-worded dissent pointed out, the effect of the Court's holding was to "immunize[] from prospective equitable relief any policy that authorizes persistent deprivations of constitutional rights as long as no individual can establish with substantial certainty that [she or] he will be injured, or injured again, in the future."[114]

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[108] Prudential concerns historically included the general prohibition against raising another person's legal rights and a preference for resolution of generalized grievances in the representative branches. See generally Doernberg, "We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action, 73 Calif. L. Rev. 52 (1985).

[109] W.J. Moore, Righting the Courts, National Journal (Jan. 25, 1992) 200, 204 (citing study by C.K. Rowland and B.J. Todd published in the Journal of Politics) (Feb. 1991).

[110] 461 U.S. 95 (1983). Justice O'Connor provided a decisive role in the 5-4 decision in Lyons.

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[111] Id. at 105.

[112] The Court apparently did not regard Lyons' permanently damaged larynx as a "continuing adverse effect."

[113] Lyons, at 105-06. The Court stated that to prove that the officer would in fact apply an illegal chokehold required a showing that "either (1) all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation, or for questioning, or (2) that the city ordered or authorized police officers to act in such manner." Id. at 106 (emphasis in original).

The decision has had nationwide impact, with courts in virtually all of the circuits applying Lyons at least once. For example, in Kerr v. City of West Palm Beach,[115] the Eleventh Circuit denied standing to three men seeking a permanent injunction against the West Palm Beach police force's misuse of its canine unit, despite the fact that all three men had been injured by the dogs unnecessarily and clear evidence that the police did not adequately control the dogs. Although conceding that the West Palm Beach Police Department's policy governing its canine unit was of uncertain constitutionality, the court refused to permit an injunction discontinuing or amending that policy. Instead, applying Lyons, the court denied the plaintiffs standing to sue based on their inability to show that they would again be unlawfully seized by one of the city's police dogs.[116] Thus, although the Police Department's policy permitted unconstitutional conduct, no one -- not even prior victims of the policy -- could seek an injunction against its continued use.

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[114] Id. at 137 (Marshall, J., dissenting).

[115] 875 F.2d 1546 (11th Cir. 1989).

[116] Id. at 1554.

Perhaps an even more alarming extension of Lyons occurred in Robinson v. City of Chicago.[117] Judge Manion's opinion in that case ruled that plaintiff arrestees had no standing to sue for injunctive relief against a police departmental policy that required, not just permitted as in Kerr, the violation of arrestees' constitutional rights. Some of the plaintiffs had been held over for as long as three days without presentation to a neutral magistrate while the police tried to build a case against them. The Supreme Court had explicitly held this sort of detention violated Fourth Amendment rights.[118] Other misdemeanant arrestees had been held for up to twelve hours, even though Illinois law required that misdemeanant arrestees are to be released on posting $100 cash bond, and even though the purpose of the detention -- verifying the arrestees' identities -- was not served where the police officers were already well-acquainted with the arrestees.[119] Although the court conceded that both detentions were unconstitutional, it nevertheless denied the plaintiffs standing to sue for injunctive relief, even though civil and Fourth Amendment rights would most certainly again be violated if they were detained again.

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[117] 868 F.2d 959 (7th Cir. 1989) cert. denied, 493 U.S. 1035 (1990).

[118] See Gerstein v. Pugh, 420 U.S. 103 (1975).

[119] 868 F.2d at 964.

Similarly, a minor arrested for alleged unauthorized use of a motor vehicle was denied standing to sue for injunctive relief against a county police department's treatment of minors during incarceration.[120] Although the plaintiff's crime would have been a misdemeanor had it been committed by an adult, the minor was processed along with adult felons, and was held incommunicado without the right to call either his parents or his attorney. Moreover, he was strip searched in the same room as the adult prisoners and subjected to comments from the jail staff about "giving him a soap on a rope and sending him upstairs to the big boys...."[121] Although the court conceded that the minor was mistreated during his incarceration, the prospect that the minor would again be arrested as a juvenile and subjected to the same mistreatment was deemed "entirely too remote to support standing for injunctive relief."[122]

Courts across the country have similarly applied Lyons to make it impossible to challenge clearly unconstitutional government conduct.[123] As commentators have noted, *Lyons* and its progeny reflect a near-total disregard for civil and human rights by the Reagan-Bush courts.[124]

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[120] Grenier v. Kennebec County, 748 F. Supp. 908 (D. Me. 1990).

[121] Id. at 910 n.1.

[122] Id. at 913.

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[123] *See*, *e.g.*, *Brown v. Edwards*, 721 F.2d 1442, 1446-47 (5th Cir. 1984) (applying *Lyons* to deny standing to sue for equitable relief from allegedly unconstitutional fee system for constables because no suggestion that plaintiff "is in any way likely or more likely than other Mississippian to be again subjected to arrest or charging by any Mississippi constable"); *Newsome v. Batavia Local School District*, 842 F.2d 920, 923 (6th Cir. 1988) (applying *Lyons* to deny standing to student expelled due solely to fellow students' accusations where student sought injunction requiring school district to devise new pre-expulsion procedures; *Meis v. Gunter*, 906 F.2d 364, 367 (8th Cir. 1990) (applying *Lyons* to deny standing to former inmate seeking injunctive relief for lack of access to documents describing prison safety standards of conduct, *cert. denied*, 111 S. Ct. 682 (1991); *Nelson v. King County*, 895 F.2d 1248, 1254 (9th Cir. 1990) (applying *Lyons* to prevent challenge to unsanitary conditions at alcohol treatment center despite evidence that 75% of residents reenter the program); *Facio v. Jones*, 929 F.2d 541, 544 (10th Cir. 1991) (applying *Lyons* to deny standing to default judgment debtor seeking declaration of unconstitutionality of Utah state rule requiring debtor to show meritorious defense before default judgment against him could be vacated); *Haase v. Webster*, 835 F.2d 902, 910 (D.C. Cir. 1986) (applying *Lyons* to deny standing to journalist subjected to illegally invasive search on return from Nicaragua where journalist sought injunctive relief governing airport police procedures); *Weiser v. Koch*, 632 F. Supp. 1369, 1373-74 (S.D.N.Y. 1986) (applying *Lyons* to deny standing to residents of homeless shelter who were suspended from the shelter system without notice or hearing where the residents sought injunctive relief from the shelters' unconstitutional suspension procedures); *Travelers Social Club v. City of Pittsburgh*, 685 F. Supp. 929, 931-32 (W.D. Pa. 1988) (applying *Lyons* to deny standing to homosexual club members seeking injunctive relief from harassment during police regulatory inspections).

[124] *See generally* Floyd, *The Justiciability Decisions of the Burger Court*, 60 Notre Dame L. Rev. 862, 934-46 (1985).

2. Preventing Challenges to Discriminatory Conduct: The Allen Decision

The Supreme Court majority once again distorted traditional standing doctrine to deny civil rights plaintiffs' judicial access in Allen v. Wright,[125] where the Court ruled that parents of African-American children attending public schools in the process of desegregation did not have standing to challenge the lax enforcement of IRS regulations where that laxity permitted racially discriminatory private schools to obtain tax-exempt status. The parents claimed that this governmental support of racist schools deprived their children of the opportunity to receive equal educational opportunities.

While conceding that the children's inability to receive a racially integrated education was a judicially cognizable injury,[126] the majority opinion by Reagan appointee Justice O'Connor deemed the injury not fairly traceable to the IRS' action, concluding that the withdrawal of the tax exemptions would not make a significant difference in integration in the public schools.[127] As recognized by Justice Stevens in his dissent, however, "tax policy, economics, and pure logic"[128] all dictated a grant of standing because of the common-sense proposition that "when something becomes more expensive, less of it will be purchased."[129]

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[125] 468 U.S. 737 (1984).

[126] Id. at 756.

[127] Id. at 757-59.

[128] Id. at 789.

For the first time, the majority in Allen used concerns about separation of powers as a rationale to deny standing in the context of an Article III inquiry.[130] That is, after Allen, concern for the separation of the three governmental branches is to guide not only questions of justiciability under the political question or prudential standing doctrines, but the Article III standing inquiry as well.[131] Under this judicial perspective, the Allen plaintiffs were deemed to have suffered no fairly traceable injury in part because, if the Court recognized that their injury stemmed from the IRS' internal procedures, "'federal courts [would have to serve] as virtually continuing monitors of the wisdom and soundness of Executive action.'"[132] Not only is the Court's absolute deference to the executive branch an abdication of the responsibility to prohibit governmental support of segregated educational institutions but, as Justice Brennan pointed out, it effectively overturned decades of precedent that recognized the "historical role played by the federal courts in eradicating race discrimination from our Nation's schools."[133]

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[129] Id. at 788 (Stevens, J., dissenting).

[130] Nichols, Abusing Standing: A Comment on Allen v. Wright, 133 U.Pa. L. Rev. 635, 636 (1985).

[131] Traditionally, even where a plaintiff met the constitutional definition of standing, the Court could invoke so-called "prudential" concerns to limit the exercise of federal jurisdiction. These concerns included the requirement that a plaintiff's complaint fall within the law's protected zone of interests and an even more general interest in reserving to the representative branches those grievances better resolved there (rather than in the courts). This latter "rule" directly implicates separation of powers concerns. The Allen decision was the first time that constitutional as opposed to prudential standing doctrine explicitly took note of these separation of powers concerns.

In fact, *Allen* effectively undermined the Court's decision just the year before in *Bob Jones University v. United States*,[134] which clearly indicated that the Internal Revenue Code *required* the denial of tax exemptions to racially discriminatory schools and that it was precisely within the judicial province to determine whether or not the IRS exercised its enforcement discretion in contravention of its Code-based or constitutional duties. Indeed, the Court's transparent attempt to mask its result-oriented logic led Justice Brennan to remark that the Court's standing rule was but "a poor disguise for the Court's view of the merits of the underlying claims."[135]

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[132] *Allen*, 468 U.S. at 759-60, (*quoting* *Laird v. Tatum*, 408 U.S. 1, 15 (1972)).

[133] 468 U.S. at 767 (Brennan, J., dissenting).

[134] 461 U.S. 574 (1983).

[135] *Allen*, 468 U.S. at 782 (Brennan, J., dissenting).

Thus, the Allen decision essentially gives lower court judges "explicit direction to do what they must have suspected all along -- to deny standing if any aspect of a case seems questionable or disconcerting,"[136] regardless of the plaintiffs' stake in the outcome. Allen has accordingly led lower courts to deny standing in other discrimination cases as well.[137]

C. Attorneys' Fees

In addition to their decisions on standing and other matters, the Reagan-Bush courts have erected other barriers that make access to the courts financially difficult or impossible. By drastically limiting the rights of civil rights plaintiffs to recover attorney's fees and expert witness fees under federal law, the Court has made it much more difficult for civil rights plaintiffs to afford representation.

In order to encourage the private enforcement of civil rights laws and to make victims whole, Congress enacted the Civil Rights Attorney's Fees Awards Act[138] and Section

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[136] See Nichols, supra note 134, at 650.

[137] See, e.g., James v. Toledo Metropolitan Housing Authority, 758 F.2d 1086 (6th Cir. 1987) (denying standing to minority plaintiffs seeking to require that the Lucas Metropolitan Housing Authority apply to build low income housing in the Toledo suburbs).

[138] 42 U.S.C. § 1988 (1988). The Act provides that the court may award the prevailing party in an action to enforce sections 1981, 1982, 1983, 1985, and 1986 of Title 42 of the U.S. Code, Title IX of the 1972 Education Amendments, or Title VI of the Civil Rights Act of 1964, a reasonable attorney's fee to cover the cost of retaining representation.

706(k) of the Civil Rights Act of 1964,[139] which require a court to award attorney's fees to a prevailing civil rights plaintiff, absent special circumstances.[140] Congress recognized that unless discrimination victims can afford to retain lawyers to represent them, victims cannot be made whole for their injuries, and the compelling national interest in eliminating discrimination will not be served.[141] Many lower courts have accordingly awarded expert witness fees to plaintiffs who otherwise would not be able to pay for what is often an absolutely necessary component of their case,[142] and to compensate plaintiff's counsel for the time spent addressing issues raised by parties that intervened in the case.[143]

In a series of decisions, however, the Reagan-Bush courts severely damaged a discrimination victim's ability to access our civil rights statutes by thwarting the Congressional intent behind attorney's fees statutes. For example, in *Evans v. Jeff D.*,[144] a legal aid attorney filed suit on behalf of children with mental disabilities incarcerated in a state-run institutional care system after discovering that they were being abused, denied therapeutic treatment and education, and incarcerated with adults. After three years of litigation, the state agreed to provide the children with all of the injunctive relief they had been seeking, but with one condition - that the children's attorney give up any claim to attorney's fees. The attorney's ethical obligation to the children required him to accept these terms, even though it meant receiving no compensation for three years of work.

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[139] 42 U.S.C. § 2000e-5(k) (1988).

[140] See Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) (per curiam).

[141] Civil Rights and Women's Equity in Employment Act of 1991, House Committee on Education and Labor, H.R. Rep. 40, 102d Cong., 1st Sess., pt.1, at 75 - 77 (1991).

[142] See, e.g., Ramos v. Lamm, 713 F.2d 546, 559 (10th Cir. 1983); Berry v. McLemore, 670 F.2d 30, 34 (5th Cir. 1982).

[143] See, e.g., Akron Ctr. for Reproductive Health v. City of Akron, 604 F. Supp. 1268, 1272 (N.D. Ohio 1984).

Contrary to the Congressional intent expressed in relevant fees statutes, the Court in *Evans* upheld the use of this coercive tactic by violators of civil rights laws to force victims to relinquish their right to attorney's fees. This result obviously will encourage defendants to condition settlement on a waiver of the right to fees. As recognized by the dissent, the specter of such a dilemma will deter the already shrinking number of civil rights attorneys accepting such cases, contradicting the statutory purpose of encouraging private civil rights enforcement efforts by making it economically feasible for individual victims to retain lawyers to vindicate their rights.

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[144] 475 U.S. 717 (1986).

In fact, lower courts that previously disapproved the type of coercive fee relinquishment in Evans have been compelled to approve the settlements. For example, in Phillips v. Alleghany County,[145] the Third Circuit ruled that it had no choice but to approve the defendant's coercion of a fee waiver even though the district court had found that the defendant, a local hospital, had exploited Mr. Phillips' paraplegic physical condition to extract the waiver. Similarly, the Ninth Circuit found itself compelled by Evans to approve a fee relinquishment in a gender and race discrimination case, even though it previously had disapproved of such waivers in all civil rights cases.[146]

In West Virginia University Hospitals, Inc. v. Casey,[147] the Supreme Court majority further harmed civil rights plaintiffs by ruling that they could not recover expert witness fees incurred as a necessary part of preparation for litigation, limiting the award to the thirty dollar per diem fee provided for the attendance of witnesses at trial.[148] The Court rejected the plaintiff's contention that the term "attorney's fees" in the fees statute encompassed expert's fees, and overturned the district court's award of $104,000 for experts' services despite the district court's finding that the experts' services were essential to the presentation of the case.[149]

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[145] 869 F.2d 234, 237-39 (3d Cir. 1989).

[146] See Wakefield v. Mathews, 852 F.2d 482, 483-84 (9th Cir. 1988). In a decision rendered the year before Evans, Marek v. Chesny, 473 U.S. 1 (1985), the Court majority also ruled that a successful civil rights plaintiff under Title VII and many other statutes could be denied attorney's fees after rejection of a pretrial offer of judgment if the relief ultimately obtained does not exceed the offer. As the House Committee on Education and Labor concluded in 1991, Marek improperly and "unduly pressures Title VII plaintiffs to respond to early settlement offers" and may "impede private actions" to enforce Title VII. H.R. Rep. 102-40, 102d Cong., 1st. Sess. (April 24, 1991) at 82.

[147] 111 S. Ct. 1138 (1991).

By denying the award of expert witness fees, the Court limited the availability of experts' services in the preparation of civil rights claims, which are often crucial to establish a plaintiff's claim. Additionally, the Court's decision will increase greatly the expenses associated with civil rights litigation, because attorneys will have to perform the tasks previously relegated to experts.[150]

As a result of Casey and Crawford Fittings, civil rights plaintiffs have had their awards under Section 1988

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[148] 28 U.S.C. § 1821(b) (1988).

[149] In so doing, the court relied on its prior decision in Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987), holding that, absent explicit statutory authority, expert witness fees may not be awarded pursuant to the general costs statute (under 28 U.S.C. Section 1821(b), fees for witnesses are limited to $30 per day for testimonial purposes; Section 1920 provides for the recovery of other costs). Casey at 1140-41.

[150] As Justice Stevens noted in dissent, had the attorneys performed the tasks performed by the experts in the case, it would have taken far longer and been far more costly to the parties. Casey at 1151 (Stevens, J., dissenting).

Title VII reduced or vacated.[151] As one court noted in reluctantly rejecting a request for fees of experts which it acknowledged played a "critical role in plaintiff's success at trial," the inability to award expert fees can operate as a "significant disincentive" to Title VII enforcement.[152]

The Supreme Court majority dealt a final blow to civil rights plaintiffs in International Federation of Flight Attendants v. Zipes[153] where it virtually immunized from liability for attorney's fees all those who intervene in Title VII employment discrimination actions. By engrafting a limitation, not present in the statute, on those from whom attorney's fees may be awarded, the court's decision disregards Congress' promise that prevailing plaintiffs will be made whole for their effort to vindicate their civil rights.[154] As a result, defendants may rely on intervenors to raise defenses, forcing plaintiffs to litigate claims against parties from whom they cannot recover fees. Thus, many victims will be forced to forego raising their claims for lack of resources and, as Justice Marshall stated in dissent, "injuries will go unredeemed and the national policy against discrimination will go unredressed."[155] Lower courts following Zipes have routinely refused to award attorney's fees against intervenors in civil rights actions.[156]

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[151] See, e.g., Quezsada v. County of Bernalillo, 944 F.2d 710, 723 (10th Cir. 1991) (award of expert's fees in wrongful death action vacated pursuant to Casey); Wedemeier v. City of Ballwin, Mo., 931 F.2d 24 (8th Cir. 1991) (expert fees no longer available for victim of police brutality under Casey); Huntington Branch NAACP v. Town of Huntington, 762 F. Supp. 528, 529 (E.D.N.Y. 1991) (reducing fee award, based on Casey); Rivera v. Dyett, 762 F. Supp. 1109, 1118 (S.D.N.Y. 1991) (refusing award of fee under Casey).

[152] Denny v. Westfield State College, 880 F.2d 1465, 1467, 1472 (1st Cir. 1989).

[153] 491 U.S. 754 (1989).

[154] Id. at 774 (Marshall, J., dissenting). The express language of Section 706(k) provides for an award of attorney's fees for prevailing parties without limiting those against whom fees may be levied. 42 U.S.C. § 2000e-5(k) (1988).

Congress repaired some of the damage done by the Reagan-Bush courts in the 1991 Civil Rights Act, where it provided for expert fees in Title VII, 42 U.S.C. § 1981, and related cases, contrary to Casey and Crawford Fitting. But in numerous other civil rights cases, such as claims under 42 U.S.C. §§ 1982 and 1983, the Courts' decisions continue to deny plaintiffs even necessary expert fees. The harm caused by decisions like Evans, Marek, and Zipes, moreover, will also continue.

Even before decisions such as Zipes and Casey, it had become clear that difficulty in obtaining attorney's fees was causing serious problems for bias victims. As an EEOC regional attorney concluded in 1989:

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[155] Id. at 780 (Marshall, J., dissenting).

[156] See, e.g., Davis v. City & County of San Francisco, 890 F.2d 1438, 1452 (9th Cir. 1989), cert. denied, 111 S.Ct. 248 (1990); Thorstenn v. Barnard, 883 F.2d 217 (3d Cir. 1989). Lower courts also have damaged attorney's fees statutes in other ways. For example, in King v. Palmer, 950 F.2d 771 (D.C. Cir. 1991) (en banc), all seven of the Reagan-Bush appointees voted to reject attorney's fees awards enhancements permitted by most other federal courts.

> The single most significant development in equal employment law has been the erosion of the ground from under plaintiffs' counsel, particularly in the area of a prevailing plaintiff's recovery of attorney's fees. The situation has deteriorated to such a degree that private counsel representing plaintiffs in equal employment cases have become an endangered species, in many places already extinct.[157]

In fact, one court concluded in 1989 that unless the decline in the number of lawyers able to represent bias victims is reversed, "the progress that has been made during the past four decades towards eradicating discrimination . . . will be halted," and the "promise of equal treatment and opportunity for all will be but empty words."[158] The Reagan-Bush courts' decisions on fees and costs have served to enhance, not reduce, that danger.

III. Reagan-Bush Court Restrictions on Remedies Under the Civil Rights Laws

Even if discrimination victims manage to overcome the hurdles to access and proof erected by the Reagan-Bush courts, their chances of obtaining adequate relief for their injuries have been severely limited by virtue of the attack on the civil rights remedies available under the law. Recent decisions have frustrated the Congressional intent that civil rights plaintiffs be "made whole" and denied to victims of discrimination the "deliverance of the century-old promise of equality of opportunity."[159]

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[157] R. Terry, Eliminating the Plaintiff's Attorney in Equal Employment Litigation: A Shakespearean Tragedy, 5 The Labor Lawyer 63 (1989).

[158] Robinson v. Alabama State Department of Educ., 727 F.Supp. 1422, 1430 (M.D. Ala. 1989).

A. Compensatory Affirmative Action

Despite the advances produced by civil rights legislation enacted throughout the last three decades, the vast majority of women and minorities remain injured by the adverse effects of decades of governmentally and privately imposed discrimination. Thus, in order to make real the promise of the Fourteenth Amendment, many government and private institutions have sought to root out the self-perpetuating effects of systemic prejudice by designing programs that act affirmatively to include women and people of color in employment, education, and other programs.

In the 1980 case of Fullilove v. Klutznick,[160] six members of the Supreme Court, only two of whom remain on the Court today, upheld the constitutionality of a Congressionally-created ten-percent "set aside" affirmative action plan set out in the Public Works Employment Act of 1977.[161] This act authorized $4 billion for state and local government public works projects and attempted to address the gross underrepresentation of minority contractors receiving government contracts by requiring that ten percent of all grant funds be expended on minority business enterprises (MBEs).[162] The Court found that the set-aside program was a constitutional method to remedy past discrimination. Rejecting arguments that Congress may never take race into account and must always act in a "color-blind" fashion, Justice Marshall wrote:

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[159] Fullilove v. Klutznick, 448 U.S. 448, 463 (1980).

[160] 448 U.S. 448 (1980).

[161] Chief Justice Burger announced the judgment of the Court and delivered an opinion in which Justices White and Powell joined. Justices Marshall, Brennan, and Blackmun concurred in a separate opinion.

> [B]ecause the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization, we conclude[] that such programs should not be subject[ed] to conventional 'strict scrutiny' -- scrutiny that is strict in theory, but fatal in fact."[163]

This standard of strict scrutiny, however, was exactly what Justices Rehnquist and Stewart advocated in dissent,[164] and was later adopted in large measure by the Reagan-Bush Court.

1. The Croson Decision

In the decade after Fullilove, more than 200 state and local jurisdictions followed the lead of Congress and instituted their own compensatory affirmative action plans in order to include in the disbursement of government benefits those groups historically excluded. In City of Richmond v. J.A. Croson Co.,[165] however, six justices, including all three of President Reagan's appointees, struck down Richmond, Virginia's minority set-aside program, agreeing that all racial classifications used by legislatures other than Congress should be judged by the exacting standard of strict scrutiny.

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[162] The Public Works Employment Act of 1977, § 42 U.S.C. 6701 (1988). MBEs were defined as businesses more than fifty percent owned by "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

[163] 448 U.S. at 519 (Marshall, J., concurring) (quoting University of California Regents v. Bakke 438 U.S. 265, 362 (1978)).

[164] 448 U.S. at 522-27 (Stewart, J., dissenting).

In 1983, the Richmond City Council adopted a plan which required all prime contractors receiving construction contracts from the city during a five year period to subcontract thirty percent of the work to minority businesses. The plan was instituted pursuant to findings that, although minority groups made up half of the city's population, less than one percent of the funds dispensed by the city for construction contracts in the previous five years had gone to minority-owned prime contractors.[166] Other pre-enactment testimony described the exclusionary history of the local construction industry and demonstrated that the Richmond area construction trade associations had virtually no minority members.[167]

The majority in Croson applied strict scrutiny and effectively sounded the death knell for many compensatory affirmative action programs by state and local governments.

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[165] 488 U.S. 469 (1989).

[166] Id. U.S. at 534 (Marshall, J., dissenting).

[167] Id.

Whereas in *Fullilove* the Court had allowed a public employer to adopt affirmative action programs based on a manifest imbalance reflecting the underrepresentation of the group in question, the *Croson* majority demanded particularized findings that the employer itself had engaged in past discrimination and that such discrimination caused the underrepresentation. Rejecting the city's contention that remedying "past societal discrimination" was a compelling interest, the Court concluded the city had failed to prove a sufficient factual predicate to the adoption of a race-based policy. Although the ratio of minority population to minority participation in subcontracting was nearly *seventy-five to one*, the Court held that evidence of minority underrepresentation due to historical or present discriminatory practices did not adequately identify actionable discrimination [or] permit tailoring of an appropriately narrow remedy.[168]

Additionally, the Court insisted that the City Council should have considered (and perhaps adopted) a plethora of race-neutral alternatives to the affirmative action plan, despite the fact that "such measures, while theoretically appealing, have been discredited by Congress as ineffectual in eradicating the effects of past discrimination" in the construction industry.[169] Given the well-exposed limitations of race-neutral measures, it was thus appropriate for a municipality like Richmond to conclude that, in the words of Justice Blackmun, '[i]n order to get beyond racism, we must first take account of race.'"[170] The decision led Justice Marshall to lament:

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[168] *Id*. at 485-86.

[169] *Id*. at 550 (Marshall, J., dissenting).

> In constitutionalizing its wishful thinking, the majority today does a grave disservice not only to those victims of past and present racial discrimination in this Nation government has sought to assist, but also to this Court's long tradition of approaching issues of race with the utmost sensitivity.[171]

2. Lower Court Decisions After Croson

The impact of Croson has been profound, leading one commentator to remark that "the era of state and local set-aside programs is in fact over."[172] The Croson strict scrutiny test has indeed been fatal in fact to numerous voluntary affirmative action contracting programs. For instance, a district court struck down under Croson the New York State Department of Transportation's compensatory affirmative action program, which had no fixed percentage of set-asides but merely encouraged the award of a "fair share" of state highway contracts to women and minority-owned business enterprises (W/MBEs). The court held that the state had failed to justify with the requisite particularity the need for the plan, even though the State had offered a vast amount of documentation cataloguing the inability of women and minority businesses to procure construction contracts. This included testimony from the Department that it had received frequent complaints from women and people of color that discrimination kept them from gaining employment in the construction industry, surveys showing that the two major New York construction associations had a female and minority membership of less than 5%, studies showing that only 1.72% of over 2000 Department contracts between 1984 and 1988 were awarded to W/MBEs, and historical and statistical information showing that prime contractors were reluctant to subcontract to either women or people of color unless required to do so by law.[173]

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[170] Id. (quoting University of California Regents v. Bakke, 438 U.S. 265 at 407 (1978) (Blackmun, J., concurring)).

[171] Croson, 488 U.S. at 552-53 (Marshall, J., dissenting).

[172] C.F. Westerhaus, Resurrecting State and Local Race-Conscious Set-Aside Programs, 67 Ind.L.J. 169, 170 (1991).

Additionally, Croson's strict scrutiny test has been applied to strike down other types of voluntary affirmative action measures. For example, Croson's requirements were used to prohibit a Texas high school from assigning two African-American football coaches to the varsity staff and reassigning two non-African-American coaches to the sophomore squad. This was despite the fact that the varsity football team was 80% African-American and there were no African-American coaches on the varsity staff, the school formerly had been subject to a court order mandating desegregation, which was formally dissolved in 1984 after the four area schools merged into two, and state and local school boards received numerous complaints from African-American coaches who had been demoted after the school mergers.[174]

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[173] See Harrison & Borrowes Bridge Contractors v. Cuomo, 743 F.Supp. 977, 980-1002 (N.D.N.Y.). See also, e.g., Cone Corp. v. Hillsborough County, 723 F.Supp. 669, 678 (M.D. Fla. 1989) (county construction set-aside program void under Croson's particularity requirement despite County commissioner's reliance on surveys, reports and testimony evidencing underrepresentation of and discrimination against women and people of color in the construction industry in that particular county); American Subcontractors Ass'n. v. City of Atlanta, 259 Ga. 14, 17-20, 376 S.E.2d 662 (1989) (Atlanta affirmative action plan requiring set-asides in city construction contracts struck down for failure to fulfill Croson's particularity requirement, as well as requirement that city first attempt gender/race-neutral remedial measures).

3. Metro Broadcasting and Lamprecht

Not long after Croson was decided, the Supreme Court considered Metro Broadcasting, Inc. v. FCC,[175] which concerned the constitutionality of Federal Communications Commission (FCC) minority preference policies. The FCC's programs awarded an advantage for minority ownership in comparative proceedings for new licenses and permitted a limited category of broadcast stations to be transferred only to minority controlled firms. The narrow 5-4 majority found that these preferences had been mandated by Congress and held that Croson had not set the standard of scrutiny to be applied to a benign racial classification that was enacted by Congress.[176] The Court thus held that the FCC programs were constitutional because they were substantially related to the achievement of an important government objective.[177] Chief Justice Rehnquist and three Reagan appointees (Justices O'Connor, Scalia, and Kennedy) dissented, urging that strict scrutiny should be applied even to those remedial actions taken by Congress.[178]

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[174] See Covington v. Beaumont Independent School Dist., 714 F.Supp. 1402, 1411 (E.D. Tex. 1989). See also, e.g., Mann v. City of Albany, 883 F.2d 999, 1005 (11th Cir. 1989) (remanding for reconsideration lower court decision dismissing claim by white male against city's affirmative action plan); Tafoya v. City of Albuquerque, 751 F.Supp. 1527, 1531 (D. N.Mex. 1990) (invalidating ordinance limiting selling of wares in historic district of Albuquerque to members of Native American tribes for failure to show with sufficient particularity past discrimination against Native Americans with respect to selling wares in district); Miami Tele-Communications, Inc. v. City of Miami, 743 F.Supp. 1573, 1580 (S.D. Fla. 1990) (striking down under Croson terms of cable company contract awarding cable monopoly to plaintiffs that required establishment of employment training programs for city youth and subcontracting of 20% of work to minority business enterprises).

[175] 110 S. Ct. 2997 (1990).

Since the Metro Broadcasting decision, two members of its majority, Justice Brennan and Justice Marshall, have retired from the Court and been replaced by appointees of President Bush. One of these, Justice Thomas, recently demonstrated his hostility to affirmative action programs with respect to women in his opinion in Lamprecht v. FCC.[179]

Despite the Supreme Court holding in Metro Broadcasting, Justice Thomas, writing for the District of

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[176] Id. at 3009.

[177] Id.

[178] Id. at 3029 (O'Connor, J., dissenting).

[179] No. 88-1395, 1992 U.S. App. LEXIS 1997 (D.C. Cir. Feb. 19, 1992).

Columbia Circuit, ruled that the FCC policy giving a slight preference to women in licensing broadcast stations was unconstitutional even under a less-than-strict scrutiny test. Justice Thomas agreed that the promotion of diverse viewpoints was an "important" objective, and wrote that the question was "whether the government's methods are 'substantially related' to the goal that it hopes to achieve."[180] Then, however, concededly "challeng[ing] certain articles of faith,"[181] he proceeded to second-guess Congress' factual basis for mandating the gender preferences, and found (in the face of specific evidence to the contrary) that nothing supported the "predictive judgment that women owners will broadcast women's or minority or any other underrepresented type of programming at any different rate than will men."[182]

Chief Judge Mikva strongly dissented. As for the majority's analysis of the relative strength of the correlation between minority ownership and programming diversity and that between female ownership and programming diversity, Judge Mikva wrote that "[t]his poses an interesting question for social scientists, but not for judges,"[183] who are bound to follow Congress' judgment and not substitute their own. "Congress clearly used reasoned analysis [rather than outdated stereotypes] when it concluded that increasing the number of women who own and manage television and radio stations will increase programming diversity."[184] Lamprecht plainly flouted the will of Congress and, in the words of Chief Judge Mikva, illustrated that "[o]ne of the most unsettling trends in appellate jurisprudence is the tendency of judges who are devoted to the original intention of the framers of the Constitution to ignore the original intentions of elected representatives in Congress."[185]

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[180] Slip op. at 18.

[181] Id. at 7 n.1.

[182] Slip op. at 26. When challenged in the dissent by Chief Judge Mikva to reconcile the majority's decision with the Supreme Court's decision in Metro Broadcasting, Justice Thomas pointed to the fact that Metro Broadcasting dealt with the FCC's race-based preference and the fact that the Court had specifically left open the question of the constitutionality of the preference for women. Slip op. at 7 n.1.

B. Consent Decrees

Consent decrees are compromises between the parties to litigation that have been formalized in a court order binding on both parties. In discrimination cases, these decrees often mandate specific remedial steps and call for continued judicial supervision. Recent Reagan-Bush court decisions have, however, opened these decrees to endless future attack and greatly reduced their ability to remedy past discrimination.

1. Martin v. Wilks

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[183] Slip op. at 1 (Mikva, C.J., dissenting).

[184] Id. at 2 (Mikva, C.J., dissenting).

[185] Id. at 24 (Mikva, C.J., dissenting).

Since the enactment of Title VII, hundreds of employment discrimination suits have been resolved by the adoption of consent decrees. Recognizing that to allow challenges to these consent decrees would undermine the concept of finality of judgment and violate the Title VII policy promoting settlement, the federal courts had adopted a rule precluding challenges by nonparties to consent decrees after they had been entered by a court.[186] In Martin v. Wilks,[187] however, the 5-4 Court majority repudiated this practice by adopting a rule that permits unlimited challenges to these decrees.

The Court ruled that years after a consent decree settling a discrimination claim against the Birmingham, Alabama fire department, dissatisfied white fire fighters could challenge employment decisions taken pursuant to the court-approved consent decree. The only solution, according to the majority, was for plaintiffs to seek the mandatory joinder of all affected persons or parties. The Court reached its conclusion despite the fact that more than 30 states considered its position unworkable.[188] As pointed out by these amici curiae, mandatory joinder is prohibitively expensive and impractical because it requires the joinder of all interested persons, regardless of the strength of their claim, or whether that person would have intervened in the first instance, and would require joining persons impossible to identify at the start of the lawsuit, such as all persons who might seek to be hired or promoted during the pendency of the decree.

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[186] See, e.g., Marino v. Ortiz, 806 F.2d 1144, 1146 (2d Cir. 1986), aff'd, 484 U.S. 301 (1988). The First, Third, Fifth, Sixth, Seventh, and Ninth Circuits also held this view. See Deveraux v. Geary, 756 F.2d 268 (1st Cir. 1985), cert. denied, 478 U.S. 1021 (1986); Society Hill Civil Ass'n v. Harris, 632 F.2d 1045 (3d Cir. 1980); Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982), cert. denied, 464 U.S. 1003 (1983); Stotts v. Memphis Fire Dep't, 679 F.2d 541 96th Cir. 1982) rev'd on other grounds sub nom. Fire Fighters Local Unit No. 1784 v. Stotts, 467 U.S. 561 (1984); Burns v. Bd. of School Commissioners, 437 F.2d 1143 (7th Cir. 1971); Dennison v. City of Los Angeles Dept' of Water and Power, 658 F.2d 694 (9th Cir. 1981).

[187] 109 S.Ct. 2180 (1989). The majority in Wilks included Reagan appointees Scalia, Kennedy, and O'Connor.

As noted by the dissent, the Court's opinion invites numerous challenges to consent decrees, settlements and judgments by individuals who have been minimally disadvantaged by a decision they chose not to participate in, and thus significantly discourages settlement of bias lawsuits by subjecting lawyers to a "never-ending stream of litigation and potential liability."[189] Furthermore, the Wilks rule allows for the unnecessary filing of suits to challenge longstanding settlements, exposes employers to inconsistent obligations, results in a waste of judicial resources, and adversely affects the interests of the original plaintiffs.

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[188] Amicus brief for Alabama, Arkansas, California, Connecticut, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Rhode Island, South Carolina, Texas, Vermont, Virginia, West Virginia, Wisconsin, Wyoming, the District of Columbia, and the Virgin Islands, Martin v. Wilks, 109 S.Ct. 2180 (1989).

[189] 109 S.Ct. at 2200 (Stevens, J., dissenting).

As expected, the Wilks decision led to the filing of numerous challenges to job discrimination remedies in the federal courts.[190] For example, white fire fighters in Chicago challenged Fire Department promotion practices taken pursuant to a court-approved settlement agreement, but the district court relied on Wilks to reject the Department's claims and allowed the action to proceed.[191] Similarly, the court in Bridgeport Guardians, Inc. v. City of Bridgeport,[192] allowed a challenge by police officers of the City of Bridgeport, Connecticut to promotion decisions made pursuant to a court-approved settlement agreement. Again, citing Wilks, the court allowed the action to proceed, rejecting the collateral attack defense raised by the defendants.[193] By opening the door to endless lawsuits challenging consent decrees, the Court seriously undermines the ability to obtain stable and effective relief under Title VII.

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[190] See People For the American Way Action Fund, The Overall Impact of the Supreme Court's 1989 Decisions on Title VII of the 1964 Civil Rights Act at 49 (Feb. 1990); People For the American Way Action Fund, The Continuing Impact of the Supreme Court's Decisions on Title VII of the 1964 Civil Rights Act (March 1991).

[191] Chicago Fire Fighters v. Washington, 736 F.Supp. 923, 927-28 (N.D. Ill. 1990).

[192] 735 F.Supp. 1126, 1133 (D. Conn. 1990).

[193] Id. See also, e.g., Riddle v. Cerro Wire and Cable Group, Inc., 902 F.2d 918, 921-22 (11th Cir. 1990) (plaintiff permitted to attack consent decree); Richardson v. Lamar County Bd. of Educ., 729 F.Supp. 806, 812-13 (M.D. Ala. 1989), aff'd, 935 F.2d 1240 (11th Cir. 1991) (consent decree entered into between a state board of education and a class of (continued...)

Congress partially reversed the Court's holding in Wilks in the Civil Rights Act of 1991, insulating from Title VII challenge employment decisions made in compliance with court-approved consent decrees or judgments if the challenger received notice of the proposed order or judgment and was given an opportunity to participate in the action but declined to do so, or raises challenges which were adequately raised by other persons who challenged the judgment or order on the same legal grounds and on the same set of facts. Some collateral attacks on Title VII consent decrees which were improper before Wilks will still be permitted, however, and the Act does not apply at all to non-Title VII bias cases. Wilks may thus continue to cause remedy problems for years to come.

2. Rufo v. Inmates of Suffolk County Jail

In addition to increasing the class of people who may challenge a consent decree, the Reagan-Bush Court has also made it easier for the parties to a consent decree to change its terms after it is entered. In Rufo v. Inmates of Suffolk County Jail,[194] the issue was whether the Sheriff of Suffolk

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[193] (...continued)
individuals did not bar plaintiff from bringing suit against the county board, even though plaintiff was member of class, because county board was not party to decree).

[194] 112 S.Ct. 748 (1992).

County, who was bound by a 1973 consent decree imposing requirements on the housing of prisoners and requiring the construction of new prison facilities to remedy constitutional violations, had met the legal standard required to modify that decree. Over the years, several modifications of the decree were granted due to changing circumstances. During at least the first five of those years, the district court had found, the constitutional violation had continued.

The district court held that the proper standard to determine the appropriateness of modification was that set forth in United States v. Swift & Co.,[195] where the Supreme Court had held that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."[196] Examining the changed circumstances, the district court found they were not sufficient to show that a "grievous wrong" would occur if the decree were not modified and ruled that, even under a more flexible standard, the sheriff was not entitled to a modification of the decree. In doing so, the court ruled that "the overcrowding problem faced by the Sheriff is neither new nor unforeseen."[197]

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[195] 286 U.S. 106 (1932).

[196] Id. at 119.

[197] 112 S.Ct. at 771 (Stevens, J., dissenting) (quoting Inmates of Suffolk County Jail v. Kearney, 734 F. Supp. 561, 564 (D. Mass. 1990) aff'd, 915 F.2d 1557 (1st Cir. 1990)).

The Supreme Court rejected the "grievous wrong" standard, held that parties may seek modification of a consent decree whenever "it is no longer equitable that the judgment should have prospective application," and remanded the case to the district court to determine whether the complained of surge in prisoner population had been foreseen.[198] As the dissent pointed out, under the very standard endorsed by the majority, the lower court's order was justified, and the majority's opinion failed to apply the "strict standard" which should be utilized in considering modification requests that "undermine the central purposes of a consent decree."[199] The opinion in Rufo may well further undermine consent decrees in civil rights cases.

C. School Desegregation Remedies

Although it has been 38 years since the decision in Brown v. Board of Education[200] declared segregated schools unconstitutional, many of our nation's schools remain under the supervision of federal courts in order to ensure their compliance with Brown. Until recently, the Court had made clear that these school districts were under an affirmative obligation to eradicate all vestiges of prior segregation, a "duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."[201]

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[198] Id. at 760, 764-65. The 6-2 majority included Reagan-Bush appointees Scalia, Souter, Kennedy and O'Connor. Justice Thomas did not participate.

[199] Id. at 772 (Stevens, J., dissenting).

[200] 347 U.S. 483 (1954).

The Supreme Court, however, has begun to weaken the ability of federal courts to supervise school districts that have yet to desegregate even after nearly forty years. The Court has done this in two ways. First, it has imposed a more lenient standard on parties wishing to dissolve a court ordered school desegregation plan. In the 1991 case of Board of Educ. of Oklahoma City Public Schools v. Dowell,[202] the Court ruled that a desegregation decree could be dissolved when the "vestiges of de jure segregation had been eliminated as far as practicable."[203] In releasing the city from the mandate of the decree, the majority ignored the practical effect of the Board of Education's current student assignment plan, which caused just over half of the city's elementary schools to be either more than ninety percent white or more than ninety percent non-white.[204] As in the affirmative action cases, the Court's majority failed to understand how neutral principles applied to a biased situation perpetuate the bias. Justice Marshall explained in dissent that the "majority's standard ignores how . . . stigmatic harm . . . can persist even after the State ceases actively to enforce segregation."[205]

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[201] Green v. County School Board, 391 U.S. 430, 437-38 (1968). See also Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1, 15 (1971) ("The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation.").

[202] 111 S. Ct. 630 (1991). The 5-3 majority in Dowell included Reagan appointees Kennedy, O'Connor, and Scalia.

[203] Id. at 638 (emphasis added).

[204] Id. at 641 (Marshall, J., dissenting).

More recently, the Supreme Court decided Freeman v. Pitts,[206] which further enables school districts to be released from some court supervision even before achieving unitary status. The school district of DeKalb County, Georgia had been under court supervision since 1969 and, in 1986, moved for dismissal of the court-ordered desegregation decree, arguing that the school system was no longer segregated. The district court recognized that several aspects of the system were desegregated and relinquished its supervision of these aspects.

Disagreeing with the Eleventh Circuit, which had reversed the district court's decision, the Supreme Court held that "[a] federal court in a school desegregation case has the discretion to order an incremental or partial withdrawal of its supervision and control."[207] On the particular facts of this case, the Supreme Court agreed with the district court's findings that racial imbalance in the school system was not the result of previous illegal segregation but was caused simply by changing demographics and residential patterns. This was despite evidence that, in the thirty-eight years since the decision in Brown v. Board of Education,[208] the majority of African-American students had never attended a school that was not disproportionately African-American.[209] As noted by Justice Blackmun, the district court, as well as the Supreme Court, failed to recognize that past segregation of schools could cause segregated housing patterns that, in turn, could continue to cause racial imbalance in the school system long after the schools themselves were no longer legally segregated.[210]

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[205] Id. at 644 (Marshall, J., dissenting).

[206] No. 89-1290 1992 U.S. LEXIS 2114, 60 U.S.L.W. 4286 (U.S. Mar. 31, 1992).

[207] Slip op. at 19.

D. Civil and Criminal Contempt Findings Against Civil Rights Violators

Finally, the Supreme Court has weakened the ability of federal judges to enforce the civil rights laws by court order, even in the face of brazen defiance by public officials of constitutional rights. In Spallone v. United States,[211] the Court allowed city council members to flout the decision of a district court judge who had found that the city of

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[208] 347 U.S. 483 (1954).

[209] Slip op. at 1 (Blackmun, J., concurring in the judgment). Justice Blackmun, joined by Justices Stevens and O'Connor, concurred in the decision to vacate the judgment and remand the case because they felt that both the decision of the court of appeals and the decision of the district court had been in error. Id.

[210] Slip op. at 4-7 (Blackmun, J., concurring in the judgment).

[211] 110 S. Ct. 625 (1990).

Yonkers had engaged in a "consistent and extreme" pattern of race discrimination in housing. The lower court had ordered the city to stop discriminatory conduct and to build its low income housing in a nonsegregated fashion by locating some of the units in white suburban areas. From the time of the court's order, however, the city engaged in dilatory tactics and the city council refused to pass legislation that would implement the long-term plan for desegregation. After repeated efforts to produce compliance, the district court eventually held the city and the council members in contempt and imposed fines.[212/] The 5-4 Supreme Court majority held that the district court did not have the power to levy the fine against the individual council members, allowing the legislators to ignore the court order and permit the city (and ultimately the taxpayers) to absorb the penalty for noncompliance.

The dissenters, led by Justice Brennan, shared the majority's uneasiness with a judge holding a legislator in contempt of court for his failure to adopt particular legislation, but they explained that the court should have the power to do so when facing such "open and sustained official defiance of established constitutional values and valid judicial orders."[213/] Justice Brennan agreed with the words of the district court judge:

[212/] Id. at 625, 628.

[213/] Id. at 635 (Brennan, J., dissenting).

> The issues transcend Yonkers. They go to the very foundation of the system of constitutional government. If Yonkers can defy the orders of a federal court in any case, but especially a civil rights case, because compliance is unpopular, and if that situation is tolerated, then our constitutional system of government fails. The issues before the court . . . are no less significant than that.[214]

Particularly in light of such circumstances, the dissenters criticized the majority's failure to respect the judgment of the district court judge that sanctions against the city alone would not produce compliance with the court's legal order or would have produced compliance more slowly and at exorbitant cost to the city treasury.[215] As the dissent explained, the Yonkers legislators were acting outside the legitimate legislative process because they "may not defy court-ordered remedies for racial discrimination merely because their constituents prefer to maintain segregation."[216] By limiting remedies against even open defiance of civil rights decrees, the majority in Spallone severely weakened remedies for discrimination.

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[214] Id. at 635 (Brennan, J., dissenting).

[215] Id. at 640-44 (Brennan, J., dissenting).

[216] Id. at 645 (Brennan, J., dissenting).

THE REAGAN-BUSH COURTS AND FREEDOM OF EXPRESSION*

Over the last decade, the Reagan-Bush courts, led by the Supreme Court, have substantially eroded free expression rights. The Reagan-Bush judiciary has employed two major tactics to limit speech rights. First, it simply defines them away, characterizing speech concerns as "conduct" rather than speech. Second, and perhaps more far-reaching, to an ever-greater degree, it elevates governmental concerns above speech rights.

A review of decisions for the last ten years reveals a clear message -- the Reagan-Bush judiciary may nominally uphold speech rights in some cases, but only if core, pure, and wholly private speech is involved. Let any governmental interest (however makeweight) or any governmental funds (however *de minimis*) intrude, or let symbolic actions take the place of words, and speech rights are imperiled. Because governmental interests are omnipresent and speech is inherently intertwined with symbol, few areas of free expression remain untouched.

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Under the Reagan-Bush judiciary, Americans' rights to free expression have been seriously damaged in several areas. These include speech restrictions on those who receive government funds, political expression and dissent, free expression in the public schools, and artistic and sexual expression.

I. SPEECH RESTRICTIONS ON RECIPIENTS OF GOVERNMENT FUNDS

The classic First Amendment violation is censorship -- punishment of an individual for what she says or writes. But the government can also distort the process of free speech and open debate by using its wealth and property to discriminate against disfavored speech:

> The instinct of the government official that leads him or her to want to jail the citizen who criticizes the government, or who espouses an offensive or dangerous idea, or who exposes official misconduct, also leads that same official to use the powers of government largesse to accomplish the same end. Thus the citizen is excluded from government property, or fired from his government employment, or deprived of a government subsidy.[1]

One of the sharpest reversals in First Amendment jurisprudence engineered by the Reagan-Bush judiciary has been the shift from a rule that the Government may not condition subsidies and grants on the relinquishment of First

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[1] First Amendment Implications of Rust v. Sullivan: Hearings Before the Subcomm. on the Constitution of the

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Amendment rights to the rule that the Government may attach whatever strings it wishes on the use of federal funds.

A. Pre-1981 Law

While the First Amendment affirmatively provides that "Congress shall make no law . . . abridging the freedom of speech," it does not require the government to facilitate the exercise of First Amendment rights. Nevertheless, prior to the advent of the Reagan-Bush judiciary, the law was clear that the government may not condition a grant on an agreement to restrict freedom of speech, nor exclude constitutionally protected speech from subsidy based upon the particular viewpoint expressed by that speech. Rather, "conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms."[2] Thus, while there is no right to government subsidy of a particular message, it was constitutionally impermissible to deny a government benefit because of the content of one's message.

Speiser v. Randall[3] is the seminal case prohibiting the government from conditioning a benefit upon the sacrifice of free speech. The Court struck down a California law conditioning a property tax exemption upon the taxpayer's swearing a loyalty oath to the United States. It ruled that

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Senate Comm. on Judiciary, 102d Cong., 1st. Sess. (July 30,
[Footnote continued on next page]

the State was "plainly mistaken in [its] argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech," and held that "the denial of a tax exemption for engaging in certain speech necessarily [would] have the effect of coercing the claimants to refrain from the proscribed speech. The denial is 'frankly aimed at the suppression of dangerous ideas.'"[4]

Similarly, in Perry v. Sindermann,[5] a junior college teacher challenged the non-renewal of his contract, alleging that it was based upon his public criticism of the college administration. The Court reasoned:

> [E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. . . . Such interference with constitutional rights is impermissible.[6]

[Footnote continued from previous page]
1991) (prepared statement of Lee Bollinger, Dean, Univ. of Mich. Law School) (not yet printed) [hereinafter Hearings].

[2] Sherbert v. Verner, 374 U.S. 398, 405 (1963).

[3] 357 U.S. 513 (1958).

[4] Id. at 518-19 (quoting American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950)).

B. The Reagan-Bush Judicial Shift

The Reagan-Bush judiciary's assault on this principle began very early in the first Reagan administration. In Regan v. Taxation With Representation,[7] the Court upheld a statutory provision denying tax-exempt status to nonprofit organizations engaged in lobbying. It held that although the government had denied tax-exempt status based upon a category of speech -- lobbying -- this denial was neutral as to viewpoint.[8] The Court tread cautiously around Speiser and Perry, carefully making clear that subsidies discriminating on the basis of viewpoint were distinguishable, and ruling that the government may not "discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.'"[9]

The following year, the Court revisited the issue of federal subsidies. This time, the pro-First Amendment majority eked out a victory. In FCC v. League of Women Voters,[10] the Court held 5-4 that Congress could not condition the receipt of grants for public broadcasting on a

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[5] 408 U.S. 593 (1972).

[6] Id. at 597.

[7] 461 U.S. 540 (1983).

[8] Id. at 548. Justice Rehnquist delivered the opinion for a unanimous court; Justices Brennan, Marshall and Blackmun filed a separate concurrence.

ban on editorializing. The Reagan Justice Department sought to portray the regulation as a mere refusal to subsidize speech activity.[11] The majority rejected that argument, observing that "a noncommercial educational station that receives only 1% of its overall income from [federal] grants [would be] barred absolutely from all editorializing," and concluded that, as a practical matter, a public television station could not "segregate its activities according to the source of its funding."[12] Accordingly, the Court determined that the content restrictions impermissibly burdened the broadcasters' use of private funds.

In a blueprint for the future, Justice Rehnquist presented his view of the government-First Amendment interface:

> All but three paragraphs of the Court's lengthy opinion in this case are devoted to the development of a scenario in which the Government appears as the "Big Bad Wolf" and appellee Pacifica as "Little Red Riding Hood." In the Court's scenario the Big Bad Wolf cruelly forbids Little Red Riding Hood to take to her grandmother some of the food that she is carrying in her basket. . . . I do not believe that anything in the First Amendment to the United States Constitution prevents Congress from choosing to spend public moneys in that manner. Perhaps a more appropriate analogy than that of Little Red

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[9] Id. (quoting Cammarano v. United States, 358 U.S. 498, 513 (1959)) (alteration in original).

[10] 468 U.S. 364 (1984).

[11] Id. at 399.

> Riding Hood and the Big Bad Wolf is that of Faust and Mephistopheles.[13]

Three years later, in Arkansas Writers' Project, Inc. v. Ragland,[14] the Supreme Court majority struck down a provision that denied general-interest magazines tax exemptions available to specialized publications, ruling that "the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its content."[15]

Rehnquist, by then elevated by President Reagan to Chief Justice, and Reagan appointee Justice Scalia dissented, building on the theme begun in League of Women Voters. They conceded that "[a]ll government displays an enduring tendency to silence, or to facilitate silencing, those voices that it disapproves."[16] However, they argued that:

> The reason that denial of participation in a tax exemption or other subsidy scheme does not necessarily "infringe" a fundamental right is that -- unlike direct restriction or prohibition -- such a denial does not, as a general rule, have any significant coercive effect. . . . There is no need, however, and it is realistically quite impossible, to extend to all speech the same degree of protection against exclusion from a subsidy

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[12] Id. at 400.

[13] Id. at 402-03 (Rehnquist, J., dissenting).

[14] 481 U.S. 221 (1987).

[15] Id. at 229.

[16] Id. at 235 (Scalia, J., dissenting).

> that one might think appropriate for opposing shades of political expression.[17]

The emerging conservative majority had its chance to erode Arkansas Writers' Project just a year later. In Lyng v. United Auto Workers,[18] the Court, ruling 5-3,[19] upheld the constitutionality of an amendment to the Food Stamp Act withholding benefits from strikers. The majority simply defined away the speech interests inherent in the strikers' status, holding that there was not only no viewpoint discrimination, but no implication of First Amendment rights at all.[20] In contrast, the dissent stressed the anti-union animus underlying the provision:

> The real purpose of the amendment . . . was not to restore some government neutrality allegedly lost because strikers are eligible for food stamps but, on the contrary, to use a denial of food stamps as a pressure on the worker -- or more accurately, on his family -- to help break a strike.[21]

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[17] Id. at 237 (Scalia, J., dissenting). The leit motif of protecting "core" political speech above other types of speech recurs frequently in Reagan-Bush judicial opinions.

[18] 485 U.S. 360 (1988).

[19] Chief Justice Rehnquist and Justices White, Stevens, O'Connor and Scalia joined the majority; Justices Brennan, Marshall and Blackmun dissented; Justice Kennedy did not participate.

[20] Id. at 369.

[21] Id. at 384 (Marshall, J., dissenting) (quoting H.R. Rep. No. 464, 95th Cong., 1st Sess. 129 (1977)) (omission in original).

The Lyng majority also ignored Supreme Court precedent. Significantly, it dismissed Sherbert in a footnote, stating that "[t]he reasoning of Sherbert has not been applied in other contexts."[22] The dissent pointed out that in 1973, the Court had struck down an exclusion of households of unrelated persons, designed to remove "hippies" and "commune residents" from the food stamp program, in Department of Agriculture v. Moreno,[23] on the basis that "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[24] The majority did not even attempt to distinguish Moreno.

C. Rust v. Sullivan

In 1991, with the replacement of Justice Brennan, the Court completed its turnaround in Rust v. Sullivan.[25] In Rust, the Court for the first time upheld the suppression of speech solely because of the presence of government funding. Now bolstered by Justices Kennedy and Souter, the Supreme Court's Reagan-Bush majority, over three separate dissents joined by four justices,[26] held constitutional regulations that conditioned a clinic's receipt of federal planning funds upon its doctors' silence about abortion, essentially no matter what the medical circumstances.

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[22] Id. at 369 n.7.

[23] 413 U.S. 528 (1973).

[24] Lyng, 485 U.S. at 385 (Marshall, J., dissenting) (quoting Moreno, 413 U.S. at 534).

[25] 111 S. Ct. 1759 (1991).

The Rust majority paid lip service to the principle of unconstitutional conditions, noting that its holding "is not to suggest that funding by the Government, even when coupled with the freedom of the fund recipients to speak outside the scope of the Government-funded project, is invariably sufficient to justify government control over the content of expression."[27] It reiterated, no less than three times, that if the regulations constituted viewpoint-based discrimination against speech, they would be unconstitutional.[28]

It then completely refused to apply this principle to the facts before it, holding that "this is not a case of the Government 'suppressing a dangerous idea'"[29] -- despite the gag rule that not only forbade doctors to mention abortion, but also affirmatively required them, if the patient asked about abortion, to say that the project did not consider abortion to be an appropriate method of family planning.

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[26] The vote was 5-4. Chief Justice Rehnquist and Justices White, Scalia, Kennedy and Souter joined the majority; Justices Marshall, Blackmun, Stevens and O'Connor dissented.

[27] Id. at 1776.

[28] Id. at 1772-73.

[29] Id. at 1772.

The majority also obliterated the distinction drawn a few years before in League of Women Voters between restrictions on public and private funds. Like the public broadcasting stations at issue in League of Women Voters, the Title X clinics received as much as 90% of their funding from non-federal sources. The Reagan-Bush majority ignored the impact of the restrictions on non-federal funds within the family planning program itself. Instead, they created a new distinction, between permissible restrictions on "projects" and prohibited restrictions on "recipients," and ruled that the restrictions only covered "projects" because the doctor was nominally free to set up a separate facility offering abortion counselling.[30] In these circumstances, the Court concluded that the Title X regulations "leave the grantee unfettered in its other activities."[31]

D. Implications of Rust

It is too early to assess fully the effects of Rust. However, the potential implications are draconian. Because of the federal government's role in virtually every aspect of American life, discriminatory subsidy decisions may have an enormous impact on free speech[32] near-indistinguishable from that of direct censorship. As one district court judge explained:

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[30] Id. at 1774. Ironically, the majority also upheld draconian separation requirements designed to restrict these unfunded activities, requiring that "a Title X project must have an objective integrity and independence from prohibited activities." It is not sufficient simply to segregate federal funds: "[m]ere bookkeeping separation of Title X funds . . . is not sufficient." Id. at 1766 (quoting 42 C.F.R. § 59.9 (1989)). Thus, the regulations mandated the existence of separate accounting records, facilities, personnel, and publicity.

[31] Id. at 1774.

> The Rust decision opened the door to government review and suppression of speech and publication in areas which had theretofore been widely thought immune from such intrusion; the government's position in this case, if endorsed by the courts, would take that door off its hinges.
>
> That position must be viewed in the context of the fact that few large-scale endeavors are today not supported, directly or indirectly, by government funds -- from the health care of senior citizens, to farm subsidies, to the construction of weaponry, to name but a few of the most obvious. Defendants' proposal would, at least potentially, subordinate the free speech rights of the participants in the programs receiving such federal monies to the government's wishes. To put it another way, if the Supreme Court decision [Rust] were to be given the scope and breadth defendants advocate in this case, the result would be an invitation to government censorship wherever public funds flow, and acceptance by the courts of defendants' position would thus present an enormous threat to the First

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[32] Even prior to Rust, courts had expressed caution about the effect of the government dollar in distorting free speech. The First Circuit, for example, cautioned that "[t]he real danger in the injection of government money into the marketplace of ideas is that the market will be distorted by the promotion of certain messages but not others." Advocates for the Arts v. Thomson, 532 F.2d 792, 798 (1st Cir.), cert. denied, 429 U.S. 894 (1976); see also Bella Lewitzky Dance Found. v. Frohnmayer, 754 F. Supp. 774, 785 (C.D. Cal. 1991).

> Amendment rights of American citizens and to a free society.[33]

In Stanford v. Sullivan, the only substantive post-Rust decision to date on the validity of government content restrictions, Carter-appointee Judge Harold Greene ruled that Rust did not allow the National Institutes of Health to impose a gag on federal grantees' discussion of federally funded research results. Judge Greene interpreted Rust restrictively, cautioning that an extension of Rust "is bound to have increasingly wide negative effects on a free society, as the legality of censorship accompanying federal monies becomes more and more common and thus more and more deeply ingrained in the fabric of government and society."[34]

Judge Greene's caution may well become reality. The Bush Department of Justice has taken an even more aggressive position than the Court did in Rust on the government's power to restrict speech through funding restrictions. In both the Stanford case and in a case artists have brought challenging National Endowment for the Arts content restrictions and discriminatory grantmaking, Finley v. Frohnmayer,[35] the Department has vigorously asserted that Rust gives the federal government the power to attach whatever strings it likes to its funds, regardless of the impact of those conditions on the free speech rights of potential grant recipients. In fact, one former NEA official recently commented that the decision in Rust "was like a new toy" to Justice Department officials and they "couldn't wait to try it out. They wanted to use the NEA to see how much they could limit the speech of those receiving federal money."[36]

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[33] Stanford v. Sullivan, 773 F. Supp. 472, 478 (D.D.C. 1991) (footnotes omitted).

[34] Id. at 478 n.19.

[35] No. CV90-5236 AWT (Kx) (C.D. Cal. filed Sept. 1990).

In testimony before the Senate Judiciary Committee Subcommittee on the Constitution, moreover, Deputy Assistant Attorney General Leslie Southwick has specifically articulated the Justice Department's extreme stand:

> [T]he government can determine whether it will sponsor or fund certain activities and . . . it has the power to condition the receipt of such funds on the advancement of what it believes to be the public interest. In a sense, when the government funds a certain view, the government itself is

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[36] Bill Lichtenstein, The Secret Battle for the NEA, Village Voice, March 10, 1992 (quoting unnamed NEA official). Another example of the Justice Department's attempted use of Rust is Bullfrog Films, Inc. v. Wick, 847 F.2d 502 (9th Cir. 1988), where the court of appeals ruled in 1988 prior to Rust that USIA regulations exempting from import duties films that the government characterized as "educational, scientific, and cultural" discriminated on the basis of content and were invalid. After Rust, however, the government argued in a later version of Bullfrog that Rust allows the government to attach content based on conditions to import duty exemptions. See Letter from Wendy Keats, Department of Justice, to Cathy Catterson, Clerk of the United States Court of Appeals for the Ninth Circuit (May 31, 1991). The Ninth Circuit dismissed the case as to the challenged sections of the USIA regulations because an intervening statute prohibited the agency from discriminating on the basis of content. Bullfrog Films, Inc. v. Wick, No. 88-6310, 1992 WL 46501 (9th Cir. Mar. 12, 1992).

> speaking. It therefore may constitutionally determine what is to be said.[37]

Thus, the Justice Department is attempting to interpret Rust, as Judge Greene warned, as "an invitation to government censorship wherever public funds flow."[38] Under the Justice Department's theory, for example, a municipality could attempt to condition public funding of a public library on removal of books deemed unsuitable or politically incorrect. Should the view of the current Supreme court majority and the Bush Justice Department prevail in future cases, the results could be far-reaching indeed, beyond Judge Greene's wildest nightmares.

II. POLITICAL EXPRESSION AND DISSENT

Freedom of speech with respect to political expression and dissent has always been a bedrock principle of First Amendment jurisprudence. The Reagan-Bush judiciary, however, has substantially expanded the power of the government to restrict such speech by imposing curbs on the ability to use public forums, by permitting government to prohibit non-verbal protest and dissent, and generally by deferring more and more frequently to government attempts at restriction. Even victories for the First Amendment in this area have often been narrow 5-4 decisions, endangering key First Amendment rights in the future.

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[37] Hearings, supra note 1 (prepared statement of Leslie H. Southwick, Deputy Assistant Attorney General, Civil Division, U.S. Dep't of Justice) (not yet printed).

[38] Stanford, 773 F. Supp. at 478.

A. Pre-1981 Law

Throughout American history, the protections of freedom of speech and freedom of assembly in the First and Fourteenth Amendments have been essential in guaranteeing to Americans the free and open exchange of ideas on public issues large and small. Political speech and dissent have always been accorded vigorous First Amendment protection, reflecting "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[39]

Over time, more of this exchange and debate has occurred in the public streets, sidewalks, and parks of our nation, in the form of rallies, protests, pickets, concerts, and other public convocations. To ensure that such assembly and discussion among the people is not impeded, constitutional law establishes what the courts have termed the "public forum doctrine." This doctrine was first articulated by Justice Roberts in 1939:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between

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[39] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

> citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.[40]

At least until the last decade, the "public forum doctrine" has served the vital role of protecting and preserving public property as a place for free speech and debate.

Protection for political expression and dissent has also rested on the Court's rulings concerning symbolic speech or non-verbal expression. In United States v. O'Brien,[41] a case which considered a statute which criminalized the public destruction of draft cards, the Court formulated a four part test to determine whether a governmental regulation of conduct was justified when the conduct included both speech and nonspeech elements.[42] First, the challenged regulation must be within the constitutional power of the government. Second, the regulation must advance a valid and important governmental interest. Third, the governmental interest advanced must be "unrelated" to the suppression of free expression. Finally, any incidental restrictions on alleged free speech rights imposed by the regulation must be essential to further the valid government interest.

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[40] Hague v. Committee for Indus. Org., 307 U.S. 496, 515-16 (1939) (emphasis added).

[41] 391 U.S. 367 (1968).

[42] Id. at 377.

The Court applied O'Brien in the 1970s to help protect political expression. For example, in Cohen v. California,[43] the Court reversed the conviction of a protestor arrested for wearing the slogan, "Fuck The Draft." The State had argued that those words amounted to a breach of the peace; applying O'Brien and other precedents, the Supreme Court reversed the conviction, holding that no general principle existed to distinguish these "offensive words" from others that the state may wish to eradicate from public discourse.[44] As the Court had noted in an earlier case, "[a] person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn."[45]

B. The Reagan-Bush Judiciary's Retrenchment on Forums for Political Speech

Throughout the 1980s, the rights of Americans to express themselves freely in public places have been jeopardized by federal judges appointed by Presidents Reagan and Bush. The result has been to significantly increase restrictive government regulation of speech in the public forum.

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[43] 403 U.S. 15 (1971).

[44] Id. at 25 ("one man's vulgarity is another's lyric").

[45] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632-33 (1943).

Two Supreme Court decisions in 1985 illustrate this trend. In United States v. Albertini,[46] Justice O'Connor's opinion upheld the conviction of a civilian anti-war protester for doing nothing more than entering a military base which had been made open to the general public for purposes related to expression. The majority ruled that even if the base could be considered a public forum for First Amendment purposes, Albertini could be convicted because he had been barred from the base nine years earlier for destroying less than $100 of government property during an anti-Vietnam War protest in 1972. According to the majority, the government's action placed only an "incidental burden on speech" and was permissible.[47] Even without reaching the First Amendment argument specifically, the dissent pointed out that the majority opinion produced a significantly overbroad interpretation of military authority, authorizing "the prosecution of a civilian who accepted a military base Commander's invitation to attend an open house on the base simply because the civilian had been 'removed therefrom' and 'ordered not to return' some nine years earlier."[48]

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[46] 472 U.S. 675 (1985).

[47] Id. at 689.

Reagan appointee Justice Sandra Day O'Connor also wrote the opinion and provided the decisive vote in a public forum decision with even broader consequences: Cornelius v. NAACP Legal Defense & Educational Fund, Inc.[49] Prior to Cornelius, the Court had ruled that in addition to traditional public forums like streets and parks, the government creates a public forum when it designates public property or facilities for expressive purposes.[50] Although the federal government had created the Combined Federal Campaign ("CFC") as a channel for the expressive purpose of permitting charitable solicitation from federal employees, the Court ruled 4-3 that the CFC was not a public forum and that the government could exclude public interest groups like the NAACP Legal Defense Fund and the Natural Resources Defense Council from the CFC. In a harsh dissent, Justice Blackmun pointed out that the majority had engaged in "circular reasoning" by saying, in essence, that because the government had previously limited the CFC to certain speakers, it could continue to do so, and could define the resulting public forum virtually any way it prefers.[51] The result, according to dissent, "ignores the principles underlying the public forum doctrine."[52]

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[48] Id. at 702 (Stevens, J., dissenting).

[49] 473 U.S. 788 (1985).

[50] See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

In Ward v. Rock Against Racism,[53] the Court further eroded expressive freedom in what the Court itself conceded was a "public forum."[54] In an opinion by Reagan-appointed Justice Anthony Kennedy, in which Justices O'Connor and Scalia joined, the Court upheld guidelines that the City of New York had established to control noise from concerts in Central Park. Under these guidelines, concert sponsors could not employ their own sound equipment or use their own sound technicians for such concerts. Instead, the City could control both the volume and the sound mix of the music because the guidelines empowered the City to furnish the sound equipment and use its own sound technician for all performances.[55] The Court approved the constitutionality of the sound amplification guideline because it was "a reasonable regulation of the place and manner of expression."[56]

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[51] Cornelius, 473 U.S. at 813 (Blackmun, J., dissenting).

[52] Id. at 815 (Blackmun, J., dissenting).

[53] 491 U.S. 781 (1989).

[54] Id. at 791.

[55] Id. at 787.

[56] Id. at 803.

However, the actual result in Ward is not as troubling as the analysis the Court employed in reaching it. Justice Kennedy's premise was that the government is free to regulate the time, place, or manner of protected speech if that regulation is "narrowly tailored to serve the government's legitimate, content-neutral interests."[57] He stressed that the government is under no obligation to choose "the least restrictive or least intrusive means of doing so."[58] Rather, the Court turned the definition of "narrow" on its head, declaring that the "narrow tailoring" requirement is satisfied as long as the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation."[59] Under this standard, Justice Kennedy openly stated that the government can regulate speech as long as "a substantial portion of the burden on speech" advances the goals of the government.[60] Thus, what citizens can say in a public park is conditioned on the goals the government deems worthy of pursuing. With the exception of content-neutrality, the government is unbounded in this regard if it merely shows that the regulation is efficient in furthering a legitimate interest.

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[57] Id. at 798.

[58] Id.

[59] Id. at 799 (quoting Albertini, 472 U.S. at 689).

[60] Id.

Because the ordinance in Ward stipulated that high quality sound should be maintained to reach all listeners,[61] there would seem little danger that the city could have censored the music or message of certain performers by using poor equipment or lowering their volume. Nonetheless, the threat to public forum expression is clear and present in Ward; its full impact, however, may not be realized until its standards are employed in other circumstances. Although Ward proscribes regulation of the content of speech in the public forum, it heralds a subtle but deliberate step backwards to the government-as-private-landowner approach of the pre-1939 Supreme Court.

The 1990 case of United States v. Kokinda[62] involved a U.S. Postal Service regulation that prohibited solicitation on Postal Service property. In particular, volunteers for the National Democratic Policy Committee were prosecuted for setting up a table on the sidewalk near the entrance of a post office owned by the Postal Service to solicit contributions and distribute literature on a variety of political issues.[63] In a plurality opinion by Justice O'Connor, in which Justice Scalia joined, and in which Justice Kennedy concurred, the Court invented a constitutional line dividing the sidewalks adjoining U.S. Post Offices from adjacent public sidewalks.[64] By declaring that a sidewalk leading to a public building was not a "public" sidewalk for public forum purposes, Justice O'Connor was able to conclude that this sidewalk was not a traditional public forum but a "nonpublic forum."[65] Accordingly, Justice O'Connor analyzed the regulation under a relaxed standard deferential to governmental restriction: the regulation only need be "reasonable" and "not an effort to suppress expression merely because public officials oppose the speaker's view."[66] Under this standard, "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. . . . The Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation."[67]

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[61] Id. at 795.

[62] 110 S. Ct. 3115 (1990).

[63] Id. at 3117-18.

The potential impact of the plurality in Kokinda is enormous. In essence, it means that when it comes to property used by and for purposes of government agencies, even a quintessential public forum-type property like a sidewalk, a public forum does not exist unless the government says so. Strangely, it no longer matters that the public has unconditional access to the place, because mere public access is now irrelevant in public forum analysis. Instead, the plurality in Kokinda emphasizes that public property that is not a "traditional public forum" (as public parks and streets are), can be considered a public forum only if the government "expressly" and "intentionally" opens it for purposes of public discourse.[68]

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[64] Id. at 3120.

[65] Id. at 3120-21.

[66] Id. at 3121 (quoting Perry Educ. Ass'n, 460 U.S. at 46).

[67] Id. at 3121-22 (quoting Cornelius, 473 U.S. at 806, 808) (emphasis added).

In his dissenting opinion in Kokinda, Justice Brennan (joined by the non-Reagan/Bush minority of the Court) criticized Justice O'Connor's opinion as "strained," "formalistic," "doctrinal pigeonholing" that obscured the fact that:

> It is only common sense that a public sidewalk adjacent to a public building to which citizens are freely admitted is a natural location for speech to occur, whether that speech is critical of

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[68] Id. at 3121. In fact, the Bush Administration Justice Department has already attempted to extend Kokinda in just this fashion. In Henderson v. Lujan, 768 F. Supp. 1 (D.D.C. 1991), the government argued that its own subjective characterization of the public sidewalk on Constitution Avenue opposite the Vietnam Veterans Memorial in Washington as part of the Memorial justified a ban on distribution of literature on the sidewalk. The lower court rejected the government's attempt to "transform the character of the property," and an appeal is pending. Id. at 2 (quoting United States v. Grace, 461 U.S. 171, 180 (1983)).

> government generally, aimed at the particular governmental agency housed in the building, or focused upon issues unrelated to the government.[69]

Justice Brennan noted the recent tendency of the Supreme Court to use public forum doctrine not to preserve First Amendment rights, as it was originally intended, but to restrict those rights, citing a number of such restrictive Court decisions rendered between 1981 and 1988.[70]

By departing from the traditional public forum protections, decisions such as Ward and Kokinda place Americans in great danger of losing their rights of free expression in public places. Particularly now that two of the dissenting Justices in Kokinda, Justices Brennan and Marshall, have been replaced by conservative successors, Justices Souter and Thomas, the rights of Americans to express themselves on public property is in even more danger. Some indication of the Court's direction will come in 1992 when the Court decides International Society for Krishna Consciousness v. Lee,[71] which concerns the public forum status of public airports. Regardless of the specific result in Lee, however, the direction seems clear: upholding more and more the ability of government to exclude speech from public property, contrary to the principles of the First Amendment.

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[69] Id. at 3128 (Brennan, J., dissenting).

[70] Id. at 3127 (Brennan, J., dissenting). These decisions included Albertini, Cornelius, Vincent and Hazelwood, which are discussed in more detail herein. See supra text accompanying notes 46, 49; infra text accompanying notes 92, 111.

[71] 925 F.2d 576 (2d Cir. 1991), cert. granted, 112 S. Ct. 855 (1992).

C. Reagan-Bush Court Restrictions on Non-Verbal Political Expression

Since the early 1980s, the courts have also restricted the public's rights to political free speech by approving more limits on non-verbal, symbolic speech. Although the Supreme Court recently struck down such limitations in the flag-burning cases, the narrow margins of these decisions and the trends reflected in other Reagan-Bush court decisions suggest significant danger in the future.

Perhaps the first warning sign was Clark v. Community for Creative Non-Violence.[72] In 1982, the National Park Service issued a permit to the Community for Creative Non-Violence ("CCNV") to conduct a demonstration in Lafayette Park, which is located across the street from the White House, and on the Mall. Both spaces are national parks regulated by the Park Service. The demonstrations, which were designed to call attention to the plight of the homeless, were planned to involve the erection of symbolic tent cities in which demonstrators would sleep. The National Park Service issued a permit allowing the erection of the tent cities but, citing a Park Service regulation that prohibited camping in national parks other than in designated campgrounds, it banned the demonstrators from sleeping in the tents.

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[72] 468 U.S. 288 (1984).

CCNV challenged the regulations, citing vagueness and First Amendment protections of symbolic speech. Although the D.C. Circuit Court of Appeals ruled in their favor, the Supreme Court reversed over the vigorous dissents of Justices Marshall and Brennan. The Court declined to recognize the important symbolic speech issues presented by the contemplated protestors.

The Court narrowly struck down attempts to limit non-verbal political protest in the flag-burning cases, Texas v. Johnson[73] and United States v. Eichman.[74] By identical 5-4 majorities in these cases, the Court invalidated state and federal laws that prohibited burning a U.S. flag as part of political protest. The dissents in both cases, however, suggested potential avenues for upholding such a statute which would have enormous negative consequences for the First Amendment. For example, Chief Justice Rehnquist suggested in Johnson that the law could be upheld because flag burning was "so inherently inflammatory that it may cause a breach of public order" despite the fact that there was no evidence that a breach of the peace was actually threatened in that case.[75] With two of the Justices in the majority in these decisions, Justices Marshall and Brennan, replaced by the decidedly more conservative Justices Thomas and Souter, the future value of Johnson and Eichman as precedent is cloudy at best.

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[73] 491 U.S. 397 (1989).

[74] 496 U.S. 310 (1990).

In fact, in the years since Clark, Reagan-Bush lower court judges have already substantially limited Americans' right to symbolic political expression. Generally, Reagan-Bush lower court judges employ two tactics when limiting symbolic speech activities: either (1) they find that the asserted politically symbolic activity is not "speech" and is therefore not entitled to First Amendment protection, or (2) they acknowledge that the asserted politically symbolic activity is speech, but find that it is not entitled to protection under the First Amendment because the government regulation of the activity is "reasonable" under the public forum doctrine discussed above.[76]

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[75] Johnson, 491 U.S. at 431 (Rehnquist, C.J., dissenting).

[76] See, e.g., Craft v. Hodel, 683 F. Supp. 289 (D. Mass. 1988). In Craft, female plaintiffs exposed their breasts at a public beach, in violation of National Park Service regulations banning nudity, to express their opposition to the exploitation and inequitable treatment of women. The Court upheld the Park Service regulation on the grounds that the plaintiff's nudity probably was not speech, but if it were, the Park service regulation was reasonable. See also Rothner v. City of Chicago, 929 F.2d 297 (7th Cir. 1991) (Court held that playing video games probably did not have

[Footnote continued on next page]

An example of the first limiting tactic comes from the Seventh Circuit, heavily dominated by Reagan-Bush appointees. In Citizens for John W. Moore Party v. Board of Election Commissioners,[77] the Seventh Circuit ruled that a law prohibiting candidates for public office from soliciting signatures to appear on the ballot for more than one party in the same election did not even affect "speech" entitled to First Amendment protection. Judge Easterbrook delivered the opinion of the court. The court held that the law limiting a candidates soliciting of signatures did not regulate speech, it simply regulated the collection of signatures. The court was willing to concede that there was possibly an expressive element in collecting signatures, but, in drawing an analogy to Clark, Judge Easterbrook wrote, "so too [was there an expressive element in] sleeping in the park," however, "[i]n Clark the government forbade sleeping in the park no matter the message, indeed no matter whether there was a message. Illinois forbids circulating petitions for two parties no

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[Footnote continued from previous page] symbolic message but even if they did, city regulation limiting when games could be played was a reasonable restriction on the video game player's First Amendment rights).

[77] 845 F.2d 144 (7th Cir. 1988), cert. denied, 488 U.S. 1029 (1989).

matter the message, indeed no matter whether there is a message."[78]

The second tactic employed by Reagan-Bush judges to stifle symbolic speech -- finding that the asserted political activity is "speech," but upholding restrictions on it because the governmental interest advanced by the restrictions is reasonable -- is more common. In ACORN v. City of Tulsa,[79] Judge Tacha, a Reagan appointee, held that a Tulsa statute which banned the erection or maintenance of any unauthorized building, hut, shanty, tent or other structure on city property was not unconstitutional on its face in spite of the statute's potential effect on First Amendment rights.[80] ACORN, a nonprofit organization that seeks to advance the interests of low and moderate income people, challenged the statute on the grounds that it was unconstitutionally vague and violated the First Amendment after ACORN was prohibited from holding a planned symbolic protest of "Reaganomics" which was to include a "burial service" for Reaganomics, a Nancy Reagan fashion show, soup kitchens and a tent city.[81]

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[78] Id. at 146-47. Another example of a Reagan-Bush judge eliminating free expression rights by holding that the asserted political activity is not speech is Young v. New York City Transit Auth., 903 F.2d 146 (2d Cir.), cert. denied, 111 S. Ct. 516 (1990). In Young, Judge Altimari, a Reagan appointee, held that begging or panhandling was not speech because it did not convey a "particularized message." Id. at 153. This activity was therefore denied First Amendment protection. This ruling reversed the decision of the district court that had held that begging and panhandling was speech and was entitled to First Amendment protection. 729 F. Supp. 341 (S.D.N.Y. 1990) (Sand, J. a Carter appointee). In a subsequent case, however, District Court Judge Sweet, another Carter appointee, held that begging was entitled to First Amendment protection. Loper v. New York City Police Dep't, 776 F. Supp. 1280 (S.D.N.Y. 1991). Judge Sweet dismissed the Second Circuit's comments in Young as dicta.

[79] 835 F.2d 735 (10th Cir. 1987).

[80] Id. at 742-44.

The Court held that the law was not unconstitutionally vague. Judge Tacha recognized that "erection of some structures does qualify as expressive conduct within the free speech guarantee of the first amendment."[82] The court, however, held that the state could regulate such activity notwithstanding its communicative element. In a startling leap of logic, the court analogized building an unauthorized structure on city property to a protestor throwing a rock through a window at the White House, stating that the "protestor may convey a strong message . . . but he will be subject to criminal sanction nonetheless."[83]

Finally, Reagan-Bush judges have even been willing to curtail such traditionally accepted symbolic political speech rights as picketing. In Northeast Women's Center, Inc. v.

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[81] Id. at 737.

[82] Id. at 742.

[83] Id.

McMonagle,[84] Reagan appointee Lowell Reed, Jr., granted a permanent injunction prohibiting anti-abortion protestors from picketing at a gynecological center which performed abortions. While the court recognized that picketing fell within the purview of the First Amendment, the court found that the injunction only placed reasonable "time, manner and place" restrictions on the picketing activity. Thus, even though the injunction had the effect of cutting off political expression, the court found it constitutional under the First Amendment.[85]

D. Other Reagan-Bush Court Limits on Political Expression

In a series of other decisions in the 1980s and 1990s, the Reagan-Bush courts have further harmed the rights of all citizens to political speech and dissent. These rulings have employed different legal rationales to reach their results. Some held that the government's interest outweighed free speech concerns, for example, while others claimed that no First Amendment interest was involved at all. The overall result, however, has been to seriously threaten the right of political expression which is fundamental to the First Amendment.

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[84] 745 F. Supp. 1082 (E.D. Pa. 1990), aff'd, 939 F.2d 57 (3d Cir. 1991).

[85] Reagan-Bush appointees have limited speech rights in other contexts by finding that the governmental regulation on speech was reasonable. See, e.g., Gannett Satellite Info. Network, Inc. v. Berger, 716 F. Supp. 140 (D.N.J. 1989) (port authority restriction against having newspaper vending machines in airports was reasonable), aff'd for this proposition and rev'd on other grounds, 894 F.2d 61 (3d Cir. 1990); Andree v. Ashland County, 818 F.2d 1306 (7th Cir. 1987) (county regulation limiting the number of people who can attend an outdoor festival was reasonable); United States v. Musser, 873 F.2d 1513 (D.C. Cir.) (United States Park Service regulation against leaving a political sign in a Park Service area unattended was reasonable), cert. denied, 493 U.S. 983 (1989); United States v. Thomas, 864 F.2d 188 (D.C. Cir. 1988) (United States Park Service regulation which prohibited camping, even though the campers were making a political statement, was reasonable).

For example, in Connick v. Myers,[86] Justice O'Connor provided the decisive fifth vote for an opinion which severely limited the free expression rights of public employees. Prior to Connick, the Court had ruled that government employees had the First Amendment right to speak out on matters of public concern, and that this right had to be balanced against the government's interest in promoting the effectiveness of employee public service.[87] In Connick, however, the Court majority reversed the lower courts and ruled that it was proper for a district attorney to fire an assistant who circulated a questionnaire seeking information about the effect of office personnel policies on employee morale and about overall work performance, claiming that this speech did not relate to any "issues of public concern."[88]

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[86] 461 U.S. 138 (1983).

[87] See Pickering v. Board of Educ., 391 U.S. 563 (1968).

[88] Connick, 461 U.S. at 154.

In a vigorous dissent for the four-justice minority, Justice Brennan explained that it is "hornbook law" that speech concerning the manner of government agency operation is an "essential part of the communications necessary for self-governance the protection of which was a central purpose of the First Amendment."[89] No justification for suppressing such political speech was offered by the district attorney's office, Justice Brennan noted, nor did the majority adduce effective support in precedent or logic for its overly "narrow conception of which matters are of public concern."[90] As the dissent concluded, the decision in Connick "inevitably will deter public employees from making critical statements about the manner in which government agencies are operated" for fear of dismissal, depriving the public of valuable information and frustrating "an essential function of the First Amendment."[91]

The Court proceeded to undermine the political speech rights of all citizens in City Council v. Taxpayers for Vincent.[92] In Vincent, the Court upheld a Los Angeles ordinance that forbade the posting of any signs, including political campaign posters or rally announcements of any size or in any number, because of a generalized aesthetic interest in eliminating signs on public property. As the dissent authored by Justice Brennan explained, the Court's decision displayed a "startling insensitivity to the principles embodied in the First Amendment."[93] Use of posted signs is a traditional and valuable means of communicating political messages in cities and towns, often with "no equivalent alternative media."[94] Yet the Court approved a total ban on such signs, without exploring more limited alternatives or even requiring a showing of specific, substantial harm or government interest. Once again, the rights of ordinary citizens to free speech on political and community issues had been seriously infringed.

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[89] Id. at 156 (Brennan, J., dissenting).

[90] Id. at 164 (Brennan, J., dissenting).

[91] Id. at 170 (Brennan, J., dissenting).

[92] 466 U.S. 789 (1984).

More recently, the Court has acted to limit political speech rights of attorneys in two cases with significant implications for free expression rights in general. Even as late as the mid-1980s, the Supreme Court recognized that group boycotts, such as an NAACP boycott in Mississippi of discriminatory white merchants, are part of political expression and should receive at least some First Amendment protection.[95] In FTC v. Superior Court Trial Lawyers

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[93] Id. at 818 (Brennan, J., dissenting).

[94] Id. at 820 (Brennan, J., dissenting).

[95] See NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1985).

Ass'n,[96] however, the Court ruled that there was absolutely no expressive component and no First Amendment protection for a boycott by Washington, D.C. lawyers assigned to represent poor criminal defendants to protest the low amount of compensation for such work. Reagan appointees Justices Scalia, Kennedy and O'Connor all voted with the 6-3 majority, which ruled that the boycott could be presumed to violate antitrust laws without even determining whether it had any anticompetitive effect. As Justice Brennan noted, boycotts have historically been important methods of expression, to political causes on both the right and the left, especially the "poorly financed causes of little people."[97] The Court's decision could lead to seriously undermining this traditional First Amendment activity.

Finally, a five-justice majority, including Reagan and Bush appointees Justices Scalia, Souter and O'Connor, upheld an important speech restriction on attorneys in Gentile v. State Bar of Nevada.[98] In general, previous Court decisions have held that restrictions on core political speech can be upheld only if they create a "clear and present danger" of significant harm.[99] The majority in Gentile, however, upheld a state bar rule that prohibits a defense attorney from making a statement about the case if it could have a "substantial likelihood of materially prejudicing" an adjudicative proceeding, even where the defense attorney is simply trying to counter adverse publicity caused by the police and prosecutors.[100] Although the Court reversed the application of the rule to the lawyer involved in Gentile itself, the chilling effect on lawyers, particularly lawyers defending unpopular causes, is obvious and significant.

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[96] 493 U.S. 411 (1990).

[97] Id. at 451 (Brennan, J., dissenting) (quoting Martin v. Struthers, 319 U.S. 141, 146 (1943)).

[98] 111 S. Ct. 2720 (1991).

III. FREE EXPRESSION IN THE PUBLIC SCHOOLS

Although the federal courts had vigorously protected free expression in the public schools until the 1980s, the Reagan-Bush courts have demonstrated an increasing proclivity toward eliminating students' free speech rights. The Supreme Court has led the way by seriously eroding key precedents protecting free expression in the schools, and the lower courts have similarly upheld many school district limitations on student speech, as well as other First Amendment restrictions in the public schools. Particularly because these restrictions are being applied in institutions charged with educating America's youth, the damage to First Amendment rights in the public schools is troubling for the future of free expression.

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[99] Id. at 2742; see, e.g., Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

[100] Id. at 2738-45.

A. The Law in the Early Eighties -- The Tinker Standard

Any discussion of the free speech rights of public school students must begin with the landmark decision in Tinker v. Des Moines Independent Community School District,[101] a case in which several high school and junior high students decided to publicize their opposition to the Vietnam War by wearing black armbands to school. The students refused to remove their armbands when requested to do so by school administrators and were suspended.

The Supreme Court held that the students' free speech rights had been violated. In an oft-quoted passage, Justice Abe Fortas confirmed that public school students enjoy the protection of the First Amendment, writing that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[102] The Court held that when speech materially and substantially interferes with the requirements of appropriate discipline in the operation of the school or impinges upon the rights of others it may be prohibited.[103]

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[101] 393 U.S. 503 (1969).

[102] Id. at 506.

[103] Id. at 513. The Court rejected the school

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The Court recognized that there may be a tension between the need for school authorities to control conduct in the schools on the one hand, and students' exercise of their First Amendment rights on the other. The Court resolved this conflict in favor of the students and free speech. The Court was justifiably concerned that to do otherwise would lead to a stifling paternalism on the part of the schools:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.[104]

That the students' speech was suppressed in school, a place where the free flow of ideas is particularly important, played no small role in the Court's decision. Justice Fortas noted that the vigilant protection of free speech rights is nowhere more vital than in the community of American schools, stating, "The classroom is peculiarly the `marketplace of

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[Footnote continued from previous page]
administration's argument that it was concerned that the students would create a disturbance by wearing the arm-bands, stating that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Id. at 508.

[104] Id. at 511.

ideas.' The Nation's future depends upon leaders trained through wide exposure to [a] robust exchange of ideas . . . ."[105] Accordingly, the Court refused to allow the imposition of content-based restraints on the free speech activities of its students.

B. The Court Retreats from Tinker

1. Limitation on Tinker's Reach

Under the guise of increasing control of public schools on the part of school administrators, the Court has seriously eroded the broad protections formerly afforded speech in the schools. The Court took its first major step away from *Tinker* in *Bethel School District No. 403* v. *Fraser*,[106] in which it upheld a school district's punishment of a student for making a sexually explicit nominating speech in favor of a fellow student at a school-sponsored assembly. The Court permitted suppression of the student's speech because the speech would "undermine the school's basic educational mission" and was "inconsistent with the `fundamental values' of public school education."[107] Furthermore, the Court stated that the "determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."[108]

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[105] *Id*. at 512 (quoting *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967)).

[106] 478 U.S. 675 (1986).

[107] *Id*. at 685-86.

While the outcome in Fraser may be justified from the standpoint of protecting youthful persons from sexually explicit speech,[109] it is unquestionable that Fraser marked a change in the Court's emphasis in the student speech area away from the free speech and expression rights that students carry with them past the "schoolhouse gate,"[110] and in favor of the importance of the school's right to control student behavior. Having retreated from Tinker's spirit (even while purporting to apply the Tinker standard), the Court opened the door to an attack on its very underpinnings.

This full frontal assault on Tinker was not long in coming. In Hazelwood School District v. Kuhlmeier,[111] decided only two years after Fraser, the Court upheld a high school principal's deletion of several articles from a school newspaper. In so doing, the Court created a distinction between private student speech and school-sponsored student speech. The Court held that while Tinker's material disruption standard still applies in the case of private student speech, if a student's speech is sponsored by a school and the school has not created a limited open forum, the school's restrictions on the student's speech will be upheld if they bear a reasonable relationship to a legitimate pedagogical concern.

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[108] Id. at 683.

[109] Id. at 684 (citing established First Amendment precedent in approving of "limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children"). This conclusion is supported by the fact that Justice Brennan concurred in the judgment in Fraser.

[110] See Tinker, 393 U.S. at 506.

[111] 484 U.S. 260 (1988).

In applying this new bifurcated standard, the Court held that the student newspaper was both sponsored by the school and a closed forum. Therefore the student's speech could be restrained if the restraint was reasonably related to a legitimate pedagogical concern. The Court held that the school's interest in preventing impressionable younger students from being exposed to the sexual content of the deleted stories was a legitimate pedagogical concern, and that the school's deletion of the stories was reasonable in light of this concern.

Justice Brennan wrote a strong dissent. While conceding that free student expression undoubtedly sometimes interferes with the effectiveness of the school's pedagogical function, Justice Brennan distinguished between interference that directly prevents the school from pursuing its pedagogical mission and interference that merely conflicts with the school's message without directly interfering. He noted that in Tinker, the Court had struck a balance in favor of free speech without resort to a forum analysis. However, in Hazelwood, the Court had created a distinction between personal speech and school-sponsored speech that Tinker did not even hint was of any (much less dispositive) relevance. Justice Brennan noted that Tinker taught that the state's undeniable mandate to inculcate moral and political values is not a general warrant to act as "thought police" stifling discussion of all but the state-approved topics and advocacy of all but the official position. Simply put, the state may not assume "an Orwellian 'guardianship of the public mind.'"[112]

2. Lower Courts Further Limit Students' Free Speech Rights

Following the Supreme Court's lead in Hazelwood, many lower federal courts have taken a very narrow view of the free speech rights of public school students. For example, in Poling v. Murphy,[113] the plaintiff was an honor student running for president of the senior class. In the student's school it was customary for candidates to give campaign speeches at a school assembly held shortly before the election. In his speech, the student criticized the school administration and suggested that it had an "iron grip" on the school. The speech was not obscene, lewd, defamatory, or within any other classification of speech not constitutionally protected by the First Amendment. Nevertheless, the Sixth Circuit upheld the school's decision to punish the student for his speech and bar him from continuing to run for president.

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[112] Id. at 286 (Brennan, J., dissenting).

[113] 872 F.2d 757 (6th Cir. 1989), cert. denied, 493 U.S. 1021 (1990).

Applying the Hazelwood standard to the case, the court noted that there was no doubt that the election assembly was a school-sponsored activity within the meaning of Hazelwood. The only question, in the court's opinion, was whether the school official's punishment was reasonably related to a legitimate pedagogical concern. The court stated:

> Local school officials, better attuned than we to the concerns of the parents/taxpayers who employ them, must obviously be accorded wide latitude in choosing which pedagogical values to emphasize, and in choosing the means through which those values are to be promoted.
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> * * *
>
> The art of stating one's views without indulging in personalities and without unnecessarily hurting the feelings of others surely has a legitimate place in any high school curriculum, and we are not prepared to say that the lesson Unicoi High tried to teach Dean Poling and his captive audience was illegitimate.[114]

Thus, the federal court of appeals has relied upon Hazelwood for the proposition that a school administrator may punish a student for speech that hurts his feelings. This is a far cry from *Tinker*, and seriously erodes free speech rights in the schools.

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[114] Id. at 762-63 (emphasis added).

In addition to cases such as *Poling* that broadly apply the *Hazelwood* standard, an even more disturbing trend has surfaced among several lower federal courts to go beyond even *Hazelwood* in limiting student speech. As noted above, in *Hazelwood*, the Supreme Court created a distinction between private student speech and school-sponsored student speech. The Court purported to reserve the full rights guaranteed by *Tinker* in the case of private student speech. However, school-sponsored student speech may be censored in the furtherance of reasonable pedagogical concerns. But, *Hazelwood*'s free speech limiting effect has been exacerbated by the fact that many of the courts applying *Hazelwood* have failed to recognize this distinction and have cited *Hazelwood* for the proposition that *all* student speech may be censored in the interest of reasonable pedagogical concerns.

For example, in *Hemry* v. *School Board*,[115] a student sought to distribute copies of a *noncurricular* newspaper in a high school. Completely ignoring *Hazelwood*'s distinction between school-sponsored and nonschool-sponsored student speech, the court allowed the school to completely ban distribution of the paper inside the school. In *Kirkland* v.

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[115] 760 F. Supp. 856 (D. Colo. 1991).

Northside Independent School District,[116] the court similarly announced an amazingly anti-speech standard, stating that virtually any "restrictions upon speech can be imposed in public schools as long as the constraints are 'reasonably related to legitimate pedagogical concerns.'"[117] In Kirkland, the appellate court reversed a jury verdict of $50,000 in favor of a discharged teacher and ruled that even though the jury found that the teacher had been fired in part because the school district disapproved of his supplemental world history reading list on ideological or religious grounds, the teacher suffered absolutely no First Amendment injury as a matter of law.[118]

C. Conclusion

In its Hazelwood decision the Supreme Court sounded a broad retreat from the free speech principles of Tinker. In place of Tinker's "material disruption" standard, the Court established a bifurcated standard under which so-called "school-sponsored" student speech may be censored in the interest of "legitimate pedagogical concerns" where the school has not created a limited open forum. The Court purported to reserve Tinker's protection for private student speech.

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[116] 890 F.2d 794 (5th Cir. 1989), cert. denied, 110 S. Ct. 2620 (1990).

[117] Id. at 801 (citations omitted).

[118] Id. at 797, 799-802; see also Virgil v. School Bd., 862 F.2d 1517, 1525 (11th Cir. 1989) (approving decision to remove the books Lysistrata and The Miller's Tale from school curriculum based on Hazelwood, despite "serious[] . . . question [as to] how young persons just below the age of majority can be harmed by these masterpieces of Western literature").

Irrespective of the wisdom of the distinction recognized in Hazelwood, two alarming trends have surfaced among lower courts purporting to apply the Hazelwood standard. First, there has been a disturbing willingness to broadly interpret "legitimate pedagogical concerns," to the degree that one court has allowed a school district to punish a student for merely hurting the principals' feelings. Second, courts have failed to grasp the distinction between private student speech and school-sponsored student speech and have held that school districts may restrict any student speech in furtherance of legitimate pedagogical concerns.

This trend is even more ominous in light of the compulsory attendance laws enacted in every state in combination with a constitutional jurisprudence that allows school districts to stifle student speech. This result presents the precise situation that so concerned Justice Fortas in Tinker and Justice Brennan in his Hazelwood dissent. We are now confronted with the very real prospect of the nation's school administrators being allowed to say, in effect: you students will be here when we want you to be here and while you are here you will hear and say only what we think is appropriate for you to hear and say. In such a case can we be far from the Orwellian guardianship of the public mind described by Justice Brennan? Indeed, are we teaching the nation's youth "to discount important principles of our government as mere platitudes?"[119]

IV. ARTISTIC AND SEXUALLY ORIENTED EXPRESSION

Review of the case law reveals that in the past ten years, the Reagan-Bush judiciary has attacked freedom of sexually oriented and artistic speech by two closely interrelated tactics: redefining it as non-speech; and increasing the weight given to governmental interests in restriction.

A. Pre-1981 Law

Although the Supreme Court has long recognized that artistic as well as political speech is protected by the First Amendment, the Court has also recognized that expression which is obscene does not receive such protection. In 1973, the Supreme Court offered specific standards for defining obscenity in Miller v. California.[120] The Court ruled that a work would be obscene if: (1) "'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest;" (2) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;" and (3) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[121]

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[119] Tinker, 393 U.S. at 507 (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

[120] 413 U.S. 15 (1973).

At the same time that obscenity, as defined in Miller, was constitutionally unprotected, non-obscene sexually oriented speech was consistently held to be entitled to full constitutional protection. Thus, for example, until the advent of the Reagan-Bush judiciary, "[t]he portrayal of sex, e.g., in art, literature, and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech."[122]

B. Reagan-Bush Judiciary Decisions

Several areas provide key examples of how the Reagan-Bush judiciary, while still formally adhering to Miller and related standards[123] for the present, has substantially broadened the power of the government to restrict even non-obscene sexually oriented artistic speech and expression.

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[121] Id. at 24.

[122] Roth v. United States, 354 U.S. 476, 487 (1957).

[123] Justice Scalia has strongly intimated that the Miller standard should be abandoned. See, e.g., Pope v. Illinois, 481 U.S. 497, 505 (1987) (Scalia, J., dissenting).

1. Restrictions on Adult Bookstores

The regulation of adult bookstores provides a classic example of the Reagan-Bush judiciary's refusal to acknowledge the free-speech implications of restrictions on conduct. In *Arcara* v. *Cloud Books, Inc.*,[124] the Supreme Court upheld a New York public health nuisance statute that permitted the closing of a bookstore which also served as a place of prostitution. The store sold sexually explicit, but not allegedly obscene, publications. The Court refused to apply the *O'Brien* test,[125] which requires balancing the governmental interest in regulating expressive conduct against the regulation's incidental effects on First Amendment rights. In refusing to apply *O'Brien*, the Court in *Arcara* limited *O'Brien's* application to two contexts. First, *O'Brien*'s balancing test would be applied in cases where the conduct being penalized, while not itself protected, had a "significant expressive element." Second, it would be applied in those cases in which penalizing the conduct "has the inevitable effect of singling out those engaged in expressive activity."[126]

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[124] 478 U.S. 697 (1986).

[125] *See supra* text accompanying notes 41-42.

[126] *Id*. at 706-07

The majority ignored altogether the First Amendment implications of closing a bookstore, instead focusing solely on the sexual activity in the store. The Court found that the sexual activity in the bookstore "manifests absolutely no element of protected expression."[127] According to Chief Justice Burger, "First Amendment values may not be invoked by merely linking the words 'sex' and 'books;'"[128] nor is the First Amendment "implicated by the enforcement of a public health regulation of general application against the physical premises in which respondents happen to sell books."[129]

Justice Blackmun, joined by Justices Brennan and Marshall, dissented, arguing that the First Amendment did apply because the mandatory one-year closure of a bookstore simply because sexual activity occurs on the premises "directly and substantially impairs First Amendment activities" and "has a severe and unnecessary impact on the First Amendment rights of booksellers."[130] For the state to abridge these rights, the dissent insisted, the state must satisfy its burden of showing that its means were "the least restrictive means of pursuing its legitimate objectives."[131]

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[127] Id. at 705.

[128] Id. at 705.

[129] Id. at 707.

[130] Id. at 710, 712 (Blackmun, J., dissenting).

[131] Id. at 710 (Blackmun, J., dissenting).

The dissent conceded that the State had a legitimate interest in forbidding sexual acts committed in public. Reversing the majority's logic, the dissent observed that "'linking the words "sex" and "books,"' is not enough to extend First Amendment protection to illegal sexual activity, but neither should it suffice to remove First Amendment protection from books situated near the site of such activity."[132] The dissent cautioned:

> The Court's decision creates a loophole through which counties . . . can suppress 'undesirable,' protected speech without confronting the protections of the First Amendment. Until today, the Court has required States to confine any book banning to materials that are determined, through constitutionally approved procedures, to be obscene. . . . A State now can achieve a sweeping result without any special protection for the First Amendment interests . . . .[133]

The dissent's fears materialized four years later. In Sequoia Books, Inc. v. Ingemunson,[134] a Seventh Circuit panel including two Reagan appointees upheld the constitutionality of an obscenity statute allowing forfeiture of property derived from or used to commit obscenity. Under an Illinois statute, any individual or business convicted twice under the

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[132] Id. at 711 (Blackmun, J., dissenting) (citation omitted).

[133] Id. at 711-12 (Blackmun, J., dissenting).

[134] 901 F.2d 630 (7th Cir.), cert. denied, 111 S. Ct. 387 (1990).

Illinois obscenity statute for selling or publishing obscene materials could be forced to forfeit all property tied to the last conviction. Sequoia Bookstore had been convicted twelve times under the obscenity statute, but the last conviction occurred almost two years before the forfeiture provision went into effect. Sequoia challenged the statute's retroactive application. Even though the bookstore was not yet subject to the forfeiture, the court considered the facial constitutionality of the statute's application. Applying Arcana, it found the O'Brien test inapplicable on the ground that the government had not tried to regulate the sale of protected reading materials or expressive activity, but merely punished past obscenity convictions that were nonexpressive.[135]

2. Decisions Concerning Child Pornography

In 1982, the Reagan Court carved out its first exception to Miller in New York v. Ferber.[136] In Ferber, the Court upheld a New York statute prohibiting persons from knowingly promoting and distributing material depicting a live sexual performance by a child under the age of sixteen, ruling that states may regulate the promotion[137] and

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[135] Id. at 636.

[136] 458 U.S. 747 (1982).

[137] To "promote" is defined as to "procure, manufacture, issue, sell, give, provide, lend, mail, delver, transfer,

[Footnote continued on next page]

distribution of sexually explicit depictions of children, even if the depictions would not be obscene under the Miller standard.

If the material contains a film or photographic reproduction of a child's sexual performance, even if not obscene, then according to Ferber, its promotion and distribution fall outside of First Amendment protections.[138] The Court in Ferber explained that "[t]he Miller standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children."[139] The Court declared that the State's interest in "safeguarding the physical and psychological well-being of a minor"[140] was compelling enough to override the First Amendment right of expression.

In 1990, the Court took Ferber a step further, upholding a state's right to criminalize the mere private possession or viewing of child pornography in Osborne v.

[Footnote continued from previous page] transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same." Id. at 751 (citing N.Y. Penal Law § 263.00(5) (McKinney 1980)).

[138] Id. at 764.

[139] Id. at 761.

[140] Id. at 756 (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).

Ohio.[141] Osborne drastically limited the longstanding rule, set forth in Stanley v. Georgia,[142] that it is unconstitutional to criminalize private possession of obscene materials because the state may not "control[] a person's private thoughts."[143] The Reagan-Bush Court, over a sharp dissent by Justices Marshall, Brennan, and Stevens, distinguished its ruling in Osborne from the decision in Stanley on the ground that the Ohio legislature's motive was to protect victims of child pornography, while the Georgia legislature's motive appeared to be a desire to prevent obscene materials from "poison[ing] the minds of its viewers."[144] Without a backward glance, the majority eviscerated the rule that "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[145]

3. Restrictions on Non-Obscene Nude Dancing

Another context in which the Reagan-Bush judiciary has dramatically undercut free expression in the area of sexual conduct is nude dancing, which the Reagan-Bush Court has ruled has significantly less First Amendment protection. In Barnes v. Glen Theatre, Inc.,[146] a 5-4 Court upheld as constitutional an Indiana public indecency statute banning nude adult entertainment-type dancing, even though it was conceded that the conduct was not obscene. The Court viewed this kind of dancing as "expressive conduct within the outer perimeters of the First Amendment, though . . . only marginally so."[147] Under O'Brien, the Court upheld the ban on "indecency", with the plurality relying on the government's interest in "protecting [societal] order and morality."[148]

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[141] 495 U.S. 103 (1990).

[142] 394 U.S. 557 (1969).

[143] Id. at 566.

[144] Osborne, 495 U.S. at 109.

[145] Stanley, 394 U.S. at 565.

Justice White, joined by Justices Marshall, Blackmun, and Stevens, dissented, arguing that nude dancing was expressive conduct and that the State's interest in promoting societal order and morality was "not sufficient justification for a statute which concededly reaches a significant amount of protected expressive activity."[149] As the dissent sharply observed, "[t]hat the performances in the Kitty Kat Lounge may not be high art, to say the least, and may not appeal to the Court, is hardly an excuse for distorting and ignoring settled doctrine."[150] Indeed, the Court's decision is an end-run around Miller, allowing the state to ban admittedly non-obscene expression because of its concern about "public morality." This could lead to restrictions on other forms of artistic expression as well, ranging from Renaissance nudes in famous art galleries to scantily clad ballet dancers.

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[146] 111 S. Ct. 2456 (1991).

[147] Id. at 2460.

[148] Id. at 2462.

[149] Id. at 2473 (White, J., dissenting).

4. Zoning

City and state governments have passed zoning laws that prohibit the opening of such businesses in designated parts of the city. The Reagan-Bush Supreme Court will uphold a zoning ordinance if it is "content-neutral," which the Court defines as serving a substantial government interest and leaving available other possible alternatives for communication, even if the ordinance imposes substantial restrictions on speech.

Thus, in City of Renton v. Playtime Theatres, Inc.,[151] the Supreme Court upheld a city ordinance that prohibited adult theatres from locating within 1,000 feet of any residential zone, park, or school. In its decision to uphold the ordinance, the Supreme Court said that "'content-neutral' time, place and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication."[152] The ordinance challenged in Renton was "content-neutral" because even though it applied only to "adult" theaters, it did not nominally target the content of the films but rather focused on the secondary effects on the community, which it found to include "a harmful effect on the area and contrib[ution] to neighborhood blight."[153]

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[150] Id. at 2474 (White, J., dissenting).

[151] 475 U.S. 41 (1986)

The Court ruled that under this "content-neutral" test the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."[154] Therefore, as long as the ordinance was not mere pretext for banning expression protected by the First Amendment, it will be upheld: The encroachment on First Amendment rights is subordinated to the "greater interest" of protecting the community.

Once again, Justices Brennan and Marshall dissented, noting that "Renton's zoning ordinance selectively imposes limitations on the location of a movie theater based exclusively on the content of the films shown there."[155] The dissent concluded:

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[152] Id. at 47.

[153] Id. at 51 (quoting Northend Cinema, Inc. v. Seattle, 585 P.2d 1153, 1156 (Wash. 1978)).

[154] Id. at 48-49.

> [T]he circumstances here strongly suggest that the ordinance was designed to suppress expression, even that constitutionally protected . . . . The Court allows Renton to conceal its illicit motives, however, by reliance on the fact that other communities adopted similar restrictions. The Court's approach largely immunizes such measures from judicial scrutiny, since a municipality can readily find other municipal ordinances to rely upon, thus always retrospectively justifying special zoning regulations for adult theaters.[156]

C. Conclusion

Thus, the Reagan-Bush judiciary has led a retreat from the *Miller* test to pursue more vigorously tests such as the *O'Brien* balancing test and the *Renton* "content-neutral" test that give governmental interests a greater chance of prevailing over individual First Amendment rights.

Under both the *O'Brien* and *Renton* tests, First Amendment rights are more easily denied and governmental interests given greater weight. These two tests provide the government greater power and ability to override individual First Amendment rights than would be the case under the *Miller* test. Consequently, under current law, individual First Amendment rights are less likely to be upheld when balanced against a government regulation.

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[155] *Id*. at 55 (Brennan, J., dissenting).

[156] *Id*. at 62 (Brennan, J., dissenting).

THE REAGAN-BUSH COURTS AND FREEDOM OF RELIGION[1]

When Justice Sandra Day O'Connor was appointed to the Supreme Court in 1981, the jurisprudence of freedom of religion rested on two doctrinal pillars. Free Exercise Clause analysis rested on Sherbert v. Verner,[2] which provided that a law that burdened the free exercise of religion could be justified only if it was the least restrictive means of furthering a compelling governmental interest. Establishment Clause analysis rested on Lemon v. Kurtzman,[3] which provided that a statute challenged on Establishment Clause grounds must have a secular legislative purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and it must not foster excessive entanglement between government and religion. As President Reagan's appointees have come to dominate the Court, the framework provided by Sherbert and Lemon has been essentially abandoned.[4]

In each of these areas, the new appointees to the Supreme Court slowly but surely eroded the established constitutional tests. In the early years, while still a minority on the Court, they wrote separate opinions -- both concurring and dissenting -- in which they criticized Sherbert and Lemon. As they developed a working majority on the Court, they were able, in a series of cases with unusual fact patterns, to dispense with the application of the Sherbert and Lemon tests altogether. Then, returning to cases that called for the application of the familiar standards, the Reagan appointees applied them in such a diluted fashion that the standards began to lose their shape and meaning.

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[1] This section was prepared by Dale E. Azaria and David H. Remes of Covington & Burling. The views expressed are the views of the authors and do not necessarily reflect the views of the firm or of other lawyers in the firm.

[2] 374 U.S. 398 (1963).

[3] 403 U.S. 602 (1971).

[4] President Bush's appointees, Justices David Souter and Clarence Thomas, have yet to participate in any major freedom of religion decisions.

The Court dealt the final blow to Sherbert, the pillar of Free Exercise Clause analysis, in its decision two years ago in Employment Division, Department of Human Resources v. Smith.[5] Many expressed shock at Smith, but in fact the decision was eminently foreseeable. As discussed below, the Court had worked its way toward Smith over a period of years. The result has been to impair the rights of all Americans to religious freedom.

In the Establishment Clause area, Lemon still stands. However, the Court has laid the groundwork for Lemon's demise even more carefully than it did for Sherbert's. Lee v. Weisman, an Establishment Clause case pending before the Court, may be the end of Lemon. Even if it is not, the end almost certainly will come in the next few years.

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[5] 110 S. Ct. 1595 (1990).

The remainder of this analysis will discuss in detail the Court's treatment of the Free Exercise and Establishment Clauses since 1981. This includes an examination of the status of the law in 1981, the Supreme Court's subsequent revision of that jurisprudence, and the impact of the Court's most recent decisions on lower federal court decisions. As discussed below, the Court prepared for the overturning of Sherbert with a series of decisions, and the same groundwork has been laid for the abandonment of Lemon. The effect has been to leave religious rights substantially unprotected by the courts. Except for an irreducible core of protection that the Court simply cannot bring itself to renounce, rights of religious freedom once guaranteed by the judiciary are now remitted to the mercies of the majoritarian political process.

I. Free Exercise Clause

A. Status of the law in 1981

Sherbert v. Verner[6] was the seminal case in Free Exercise Clause jurisprudence. It was in Sherbert that the Court established that a state law that burdens the free exercise of religion can stand only if it is a narrowly tailored means of achieving a compelling governmental interest. Under this test, even if the law is one of general application, prohibiting conduct without regard to its motivation, the law cannot be applied to prohibit religiously motivated conduct without extraordinary justification.[7] In Sherbert, the Court employed the compelling interest test to hold that South Carolina could not deny otherwise-available unemployment benefits to a Seventh-Day Adventist who lost her job because she refused to work on Saturdays for religious reasons.

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[6] 374 U.S. 398 (1963).

The Court subsequently applied Sherbert's compelling state interest test in Wisconsin v. Yoder,[8] a challenge to a criminal law of general applicability. In that case, Amish parents challenged Wisconsin's compulsory school attendance law. They refused to send their children to school because the values taught in school were directly at odds with their Amish values, and their children, by attending school, would be exposed to influences in conflict with Amish beliefs. The Court again held that a law that burdened religion had to be justified by a compelling state interest and had to represent the least restrictive method of serving that interest. In the ringing words of the opinion, "[o]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[9] The Court found that Wisconsin had a compelling interest in enforcing its compulsory school attendance laws, but it further found that the Amish way of life adequately served those interests: Amish children were well prepared for participation in our political system and society.[10] The Court therefore ruled that the compulsory school attendance laws violated the Amish peoples' free exercise rights.

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[7] Id. at 403.

[8] 406 U.S. 205 (1972).

[9] Id. at 215.

The combined effect of Sherbert and Yoder was to demarcate a broad range of government actions that would be carefully scrutinized for free exercise violations. Sherbert established that a burden on free exercise could consist of even the indirect penalty of ineligibility for unemployment compensation under a civil statute, while Yoder showed that the same scrutiny applied to facially neutral criminal laws of general applicability. Furthermore, once the Free Exercise Clause was implicated, government action would pass muster only if it satisfied the demanding two-part test of compelling state interest and least restrictive alternative.

B. Impact of the Reagan-Bush Courts

The first step for the Supreme Court in the process of doing away with Sherbert's broad protection of free exercise rights took the form of narrowing the range of cases to which Sherbert applied. The Court did so by putting certain types of government action outside the range of compelling state interest analysis. Subsequently, these "exceptions" to Sherbert would make it easier for the Court to claim that the rule enunciated in Sherbert was not a general rule.

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[10] Id. at 222-24.

Thus in 1986, for the first time in over twenty years, the Supreme Court decided a free exercise case without employing the analysis described in Sherbert. In Bowen v. Roy,[11] the Court held that the government did not need to show a compelling interest to justify purely "internal governmental procedures," such as the required identification of citizens by Social Security numbers, even if the use of such numbers violated an individual's religious beliefs. The Court explained that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."[12] This decision, supported by an eight-to-one vote, seemed very narrow, but it set a precedent for rejecting Free Exercise claims without applying compelling state interest analysis.[13]

The Supreme Court further undermined Sherbert by deciding that government action in certain specialized settings also did not call for application of the compelling interest standard. Thus in Goldman v. Weinberger,[14] the

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[11] 476 U.S. 693 (1986).

[12] Id. at 700.

[13] Justice White dissented on the ground that Sherbert and Thomas controlled the outcome in Roy. 476 U.S. at 733.

[14] 475 U.S. 503 (1986).

Court declined to apply the Sherbert standards to Air Force uniform regulations, choosing instead to show "great deference" to the "considered professional judgment" of military officials who refused to make exceptions to those regulations to accommodate the free exercise of religion.[15] Goldman, a Jewish Air Force psychologist whose religion required him to keep his head covered with a yarmulke, had sought an exemption from an Air Force regulation that prohibited uniformed personnel from wearing any type of headgear while indoors. Justice Rehnquist, writing for a five-justice majority, did not consider the extent to which the regulation burdened Goldman's religious beliefs, did not look for a compelling state interest or any less restrictive alternatives, and did not even evaluate the legitimacy of the government's purported interest. Justice Rehnquist simply upheld the challenged regulation on the ground that it "reasonably and evenhandedly" regulated dress in accord with the military's "perceived need for uniformity."[16]

In O'Lone v. Shabazz,[17] the Court similarly refused to apply the Sherbert test to prison regulations. In O'Lone, Islamic prison inmates challenged a regulation that operated to prevent them from attending weekly congregational religious services held on Friday afternoons. The majority opinion, again written by Chief Justice Rehnquist, held that a prison regulation that burdens inmates' constitutional rights is "valid if it is reasonably related to legitimate penological interests."[18]

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[15] Id. at 508-10.

[16] Id. at 510. Congress later overturned the Goldman decision. See Pub. L. 100-180, Div. A, Title V, § 508(a)(2), 101 Stat. 1086 (1987) (codified at 10 U.S.C. § 774).

[17] 482 U.S. 342 (1987).

Roy, Goldman, and O'Lone all were seemingly narrow decisions, apparently confined to unique situations. None of them appeared, on the surface, to pose any great threat to Free Exercise Clause doctrine. These three narrow decisions, however, prepared the Court to take much broader steps towards eliminating compelling state interest analysis of free exercise claims in general.

The Court's next step was to expand the scope of government actions to which Sherbert's compelling state interest analysis did not apply. In Lyng v. Northwest Indian Cemetery Protective Ass'n,[19] the Court rejected a free exercise challenge to the federal government's decision to build a road, and to allow timber-harvesting, in an area that was "an integral and indispensable part of Indian religious conceptualization and practice."[20] In rejecting this challenge, the Court professed an inability to distinguish between "[t]he building of a road or the harvesting of timber on publicly owned land" and "the use of a Social Security number."[21] The majority simply ignored the "internal procedures" rationale of the Roy decision. The majority also ignored the drastic impact that building the road was predicted to have on the Indians' ability to exercise their religion, and the inconsequential government interest in building the road.[22] It held that the government's action was constitutional because "the affected individuals [would not] be coerced by the Government's action into violating their religious beliefs; nor would [the] governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[23]

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[18] 107 U.S. at 349. Justice Brennan, writing for the four dissenting justices, suggested that prison officials should have to demonstrate "that the restrictions they have imposed are necessary to further an important government interest, and that these restrictions are no greater than necessary to achieve prison objectives." Id. at 354.

[19] 108 S. Ct. 1319 (1988).

[20] Id. at 1322.

The majority distinguished Sherbert by suggesting that the state's denial of unemployment benefits in that case, based solely on a refusal to violate the Sabbath, was like a fine imposed on the religious activity of Sabbath worship.[24] In Lyng, by contrast, the majority found no fine on any religious activity, and thus no coercion to act contrary to one's religious beliefs.[25] The majority in Lyng did not explain why merely penalizing a religious practice should be of greater constitutional concern than government action that renders a religious practice virtually impossible.

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[21] Id. at 1325.

[22] The trial court had found that the road in question would not improve access to timber resources and was not necessary for harvesting the timber. Id. at 1333 (Brennan, J., dissenting).

[23] Id. at 1325.

[24] Id. at 1326.

Once Sherbert had been weakened by its non-application in Roy, Goldman, O'Lone, and Lyng, the Court dealt the coup de grace in Employment Division, Dept. of Human Resources v. Smith.[26] In that case, the Court ruled that the Free Exercise Clause does not prohibit the state from applying a generally applicable criminal law to religious conduct unless a second constitutional right, in addition to free exercise, is implicated.[27] Smith and Black, two adherents of the Native American Church, had been fired from their jobs with a private drug rehabilitation organization because they had ingested peyote for sacramental purposes at a ceremony of the Church, in violation of their employer's rule prohibiting the use of any non-medicinal drugs or alcohol. Smith and Black were denied unemployment compensation, based on a determination that they had been discharged for work-related misconduct in violation of their employer's policy.

The Oregon Supreme Court held that the denial of unemployment benefits to Smith and Black violated the First

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[25] Id.

[26] 110 S. Ct. 1595 (1990).

[27] Id. at 1601.

Amendment under Sherbert. The United States Supreme Court, however, used the case to decide whether the state's criminal-law prohibition against peyote possession violated the First Amendment. The Court held that it did not. Drastically limiting Sherbert, the Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[28]

The majority attempted to distinguish Yoder and similar cases by characterizing them as having been decided based on "not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections" -- in Yoder, for example, a parent's right to direct his or her children's education.[29] This distinction, however, is unsupportable. Although there was a passing reference in Yoder to the interest of parents with respect to the religious upbringing of their children, it is clear from the text of the Yoder majority opinion that the case was decided based on the Free Exercise claim alone.[30] As Justice O'Connor acknowledged in her concurring opinion in Smith, the Court had consistently regarded Yoder and the other cases similarly distinguished "as part of the mainstream of our free exercise jurisprudence."[31]

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[28] Id. at 1600. The Oregon Supreme Court had held that the state's asserted interest in implementing its criminal-law prohibition against peyote possession was not relevant in assessing eligibility for state unemployment benefits. Remarkably, the U.S. Supreme Court disagreed with the Oregon Supreme Court's determination of this state-law question. It held, in effect, that the Oregon Supreme Court was bound to accept the state Attorney General's assertion that eligibility for unemployment benefits must be assessed taking account of the state's law-enforcement goals. See Employment Div., Dept. of Human Resources v. Smith, 485 U.S. 660, 676-77 (1988) (Brennan, J. dissenting). Once the Court had decided that the state's asserted law-enforcement interests were relevant, it became necessary to determine whether those interests outweighed Black and Smith's free exercise claims. At that point, the Court held that no balancing was necessary after all, because the criminal-law prohibition in question was general in nature and thus could not violate Smith and Black's free exercise rights.

[29] Id. at 1601.

The majority also sought to distinguish Sherbert on the ground that Sherbert applied only to unemployment compensation claims. The majority acknowledged that it had, in the past, "purported" to apply Sherbert in cases outside the unemployment compensation context, but concluded that it had not really done so because the test had been satisfied.[32] The Court also cited Roy, Goldman, O'Lone and Lyng as precedent for not applying Sherbert,[33] without mentioning the special circumstances that were the basis of the Court's decisions in the first three of those four cases.

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[30] Yoder stated that "in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that . . . there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." 406 U.S. at 214. Yoder also stated that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." 406 U.S. at 215.

[31] 110 S. Ct. at 1609.

[32] Id. at 1602.

[33] Id. at 1602-03.

Even Justice O'Connor, who concurred in the Court's judgment, criticized the majority's opinion, saying that it "dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty."[34] Justice O'Connor noted that the First Amendment "does not distinguish between laws that are generally applicable and laws that target particular religious practices,"[35] and she noted that, contrary to the majority's attempt to suggest otherwise, the Court's "free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice."[36]

Although the Court had methodically paved the way for Smith's rejection of Sherbert's compelling state interest analysis, many observers were shocked at the Court's decision. The Court had given no indication that it was poised to reconsider, much less jettison, the Sherbert decision in this case. Moreover, the Court did not have to reject Sherbert in order to rule against Smith and Black. It could have framed its decision in terms of the traditional compelling state interest analysis, as Justice O'Connor advocated,[37] had it chosen to do so. Instead, the Court went out of its way to reject Sherbert as precedent.

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[34] Id. at 1606.

[35] Id. at 1608.

[36] Id.

Smith's effects are rapidly revealing themselves. Lower courts have applied Smith to deny free exercise challenges in a broad range of situations, some of which appear closer to the scenarios of earlier Supreme Court cases that had upheld free exercise challenges. Many of these decisions go beyond even what Smith appears to sanction.

For example, Smith was the basis for a recent Fifth Circuit decision denying a claim brought by members of The Peyote Way Church of God, a church that worshipped peyote and used it as a sacrament.[38] The members of Peyote Way challenged a state statute that prohibited the use of peyote by anyone who was not a member of the Native American Church. Even though the challenged statute was not "generally applicable" -- as noted, it specifically exempted members of the Native American Church -- the Fifth Circuit concluded in a cursory two-paragraph discussion that after Smith, the Sherbert standard was irrelevant to a free exercise challenge to a criminal statute. The Fifth Circuit stated that Smith "eviscerates judicial scrutiny of generally applicable criminal statutes in response to free exercise challenges," and held that the prohibition of peyote possession did not violate the Free Exercise Clause.[39]

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[37] 110 S. Ct. at 1613-1615.

[38] Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991).

Similarly, in Yang v. Sturner,[40] the trial court dismissed a claim for damages for emotional distress based on violation of Free Exercise Clause rights. The plaintiffs, members of the Hmong religion, sued the Chief Medical Examiner of the State of Rhode Island for performing an autopsy on their son without their consent and in violation of their deeply-held religious opposition to autopsies. Because the Medical Examiner had general discretion to conduct autopsies if there was reason to believe the cause of death was homicide, suicide, or accident, the court held that the state was not required to respect the parents' religious objection. The objection voiced by the parents could have been viewed as resting on a second constitutional right -- the right of parental control similar to that asserted in blood-transfusion cases.[41] However, because there was no indication that the law was enacted with animus toward any religious group, and because the law was facially neutral, the trial court confessed that, under Smith, "I can no longer rule that this impairment rises to a constitutional level" -- even while recognizing that the law's application "profoundly impair[s] the Yangs' religious freedom."[42]

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[39] 922 F.2d at 1213. The Court also rejected Peyote Way's Equal Protection Clause claim, on the remarkable ground that the exemption for members of the Native American Church was a political, not a racial or religious, classification, so it need only be subject to the rational basis test, not strict scrutiny. Id. at 1215.

[40] 750 F. Supp. 558 (D.R.I. 1990).

[41] See, e.g., Jehovah's Witnesses v. King County Hospital, 390 U.S. 598 (1968).

It is not only the free exercise rights of small minority sects such as The Peyote Way or the Hmong that have been affected by Smith. For example:

- A Jewish woman's claim that Michigan's decision to perform an autopsy on her son violated her free exercise rights similarly was rejected -- on the ground that the autopsy law was general in nature, religion-neutral, and reasonably related to a legitimate governmental objective.[43]

- A Catholic group sought a ruling that the Immigration Reform and Control Act ("IRCA") violated the Free Exercise Clause on the ground that it required the group to discriminate in hiring based on national origin and immigration status, contrary to the group's religious beliefs regarding equal treatment of all people. The court held that IRCA nonetheless is constitutional, because it is a neutral law with no discretionary exemptions. The court refused to apply strict scrutiny because the Catholics had not claimed violations of any rights other than free exercise.[44]

- The Salvation Army's challenge to New Jersey boarding house regulations that conflicted with the Salvation Army's religious practices in a home it ran for homeless men was rejected by the Third Circuit based on Smith.[45] Unless the Salvation Army could establish a "hybrid" claim on remand, it

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[42] 728 F. Supp. at 560.

[43] Montgomery v. County of Clinton, 743 F. Supp. 1253, 1259 (W.D. Mich. 1990), aff'd, 940 F.2d 661 (6th Cir. 1991).

[44] Intercommunity Center for Justice & Peace v. I.N.S., 910 F.2d 42 (2d Cir. 1990). Accord American Friends Serv. Comm. Corp. v. Thornburgh, 951 F.2d 957 (9th Cir. 1991) (rejecting similar challenge to IRCA brought by Quaker organization).

[45] Salvation Army v. Dept. of Community Affairs, 919 F.2d 183 (3d Cir. 1990).

> would either have to comply with the regulations, which contradicted many of the fundamental tenets of the religion, or close the shelter entirely.[46]

The respondents in Smith warned in their petition for rehearing that "[e]very religious group in the country will be profoundly disadvantaged" by the decision in that case.[47] Under Smith, they argued, the "government could, for example, without constitutional impediment, bar all 'non-humane' slaughter, and thus effectively outlaw Jewish and Moslem ritual slaughter; outlaw as medically unnecessary all circumcision, including that practiced for religious reasons by Jews, Moslems and Coptic Christians, and outlaw all use of alcoholic beverages, including that used for communion and other religious purposes by Catholics and other Christians."[48]

It is impossible to predict whether such drastic scenarios in fact will occur, but it is apparent that

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[46] Id. In addition to limiting free exercise rights, Smith eventually may reach outside the Free Exercise arena to affect other constitutional rights. In Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991), a free expression challenge to a public indecency statute, Justice Scalia recommended, in a concurring opinion, that such a challenge should be decided under the type of standard enunciated in Smith -- i.e., that the First Amendment should be understood to protect expressive conduct only against laws that specifically prohibit conduct precisely because of its communicative attributes. On the logic of Smith, he suggested, laws of general application should be upheld despite the impact on freedom of expression.

[47] Petition for Rehearing, Employment Division, Dept. of Human Resources v. Smith, United States Supreme Court, No. 88-1213, at 2.

[48] Id. at 2-3.

Americans' rights to free exercise of religion will continue to be impaired. Potential remedies will have to be sought in legislative action. For example, federal legislation such as the proposed Religious Freedom Restoration Act[49] could undo much of the damage done by Smith by reinstating the Sherbert standard in free exercise cases. Unless and until such legislation is enacted, free exercise rights will have been seriously damaged.[50]

II. Establishment Clause

As with the Free Exercise Clause, the Supreme Court spent most of the 1980's preparing to abandon the pre-1981 foundation of Establishment Clause jurisprudence, Lemon v. Kurtzman.[51] In this area, the final blow has not yet been administered, but the preparation for it has been very similar to the preparation for the abandonment of Sherbert. Lemon has been distinguished, diluted, and repeatedly criticized, so that there can be virtually no doubt that its demise is both imminent and assured. The only question that remains is how or indeed whether the values underlying the Establishment Clause will continue to be protected once Lemon is no longer the standard.

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[49] H.R. 2797, 102d Cong., 1st Sess. (1991).

[50] The Supreme Court has granted certiorari in a challenge to a city ordinance aimed at prohibiting the killing of animals for ritual or sacrifice, even though animals may be killed for almost any other reason, including for sport. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 723 F. Supp. 1467 (S.D. Fla. 1989), aff'd without opinion, 936 F.2d 586 (11th Cir. 1991), cert. granted, 60 U.S.L.W. 3453 (1992). It is possible that the Court will use this case to illuminate the test announced in Smith.

[51] 403 U.S. 602 (1971).

A. Status of the law in 1981

The Establishment Clause was first applied to the states in 1947, in Everson v. Board of Education.[52] In that case, the Supreme Court outlined the minimum protections of the Establishment Clause:

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions. . . . In the words of Jefferson, the clause against establishment or religion by law was intended to erect 'a wall of separation between Church and State.'[53]

Everson made it clear that the government may not aid religion in any way. The government cannot adopt religious practices, give financial aid to religious organizations, or coerce religious activities or beliefs of any type.

In Lemon v. Kurtzman,[54] the Court established a three-part test to facilitate application of the guidelines described in Everson. For government action to survive an

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[52] 330 U.S. 1 (1947).

[53] Id. at 16 (citation omitted).

[54] 403 U.S. 602 (1971).

Establishment Clause challenge, "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster an excessive government entanglement with religion."[55]

The Court has always been careful to refer to Lemon as simply "a helpful signpost,"[56] or as "guidelines,"[57] abjuring slavish adherence to "any single test or criterion in this sensitive area."[58] However, the fact is that, like Sherbert in the free exercise area, Lemon has long been the basis of Establishment Clause analysis. The Court has applied Lemon to every Establishment Clause case but two since it was decided. As the appointees of President Reagan have come to dominate the Court, however, Lemon has been attacked from all sides, and has been badly weakened in the process. Furthermore, in the process of weakening the particular test described in Lemon, the Court has undercut the broader precepts of Everson.

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[55] Id. at 612-13 (citations omitted).

[56] Mueller v. Allen, 463 U.S. 388, 394 (1983).

[57] Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

[58] Lynch v. Donnelly, 465 U.S. 668, 679 (1984).

B. Impact of the Reagan-Bush Courts

Mueller v. Allen[59] was the first Establishment Clause case in which Justice O'Connor participated. A five-justice majority, which included Justice O'Connor, decided that a tax deduction for tuition and other school-related expenses did not have the primary effect of advancing the sectarian aims of parochial schools. In doing so, the Court distinguished Committee for Public Education & Religious Liberty v. Nyquist,[60] in which the Court had invalidated, under Lemon, a New York tax credit for parents paying private school tuition. The Court distinguished Nyquist on the ground that the tax credits that case were available only to parents of children in nonpublic schools, whereas in Mueller the benefits were available to parents of all schoolchildren. While the Mueller statute in fact was facially neutral, the Nyquist court was not concerned with neutrality or the lack of it but with preventing tax dollars from being channelled into religious institutions. The facial neutrality of the Mueller statute was thus a distinction without a difference, especially because the Court refused to consider the evidence on the record that, in practice, the great majority of benefits under the statute were claimed by parents of children in parochial schools.[61]

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[59] 463 U.S. 388 (1982).

[60] 413 U.S. 756 (1973).

The Mueller tax deduction thus required "that taxpayers in general pay for the cost of parochial education and extended a financial 'incentive to parents to send their children to sectarian schools.'"[62] Such indirect assistance to parents should be impermissible because it is not subject to restrictions that guarantee the separation between secular and religious educational functions, so there is no assurance that state financial aid supports only the former. Once government aid begins supporting religious education, the government has leverage to attempt to dictate the content of religious lessons.

A major change in Establishment Clause analysis came the year after Mueller, in Marsh v. Chambers,[63] where the Court rejected a taxpayer's challenge to the Nebraska legislature's practice of opening each legislative session with a prayer by a state-employed chaplain. In upholding the practice, the Court did not even mention Lemon.

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[61] Mueller, 463 U.S. at 400-01. Although the tax deduction in Mueller could be used for expenses such as gym clothes, pencils, and notebooks, the bulk of the $700 per child available deduction would be used only by those parents paying for their children's tuition, and a full 96% of parents paying tuition for their children in Minnesota were sending their children to parochial schools.

[62] Id. at 407 (Marshall, J., dissenting) (quoting Nyquist, 413 U.S. at 786).

[63] 463 U.S. 783 (1983).

The majority in Marsh relied on "the history and tradition of this country," noting that legislative sessions had been opened with prayers since the days of the First Congress, which approved the First Amendment and submitted it to the states for ratification.[64] The majority did not acknowledge the obvious -- that the practice of legislative prayer is invalid under each of the three prongs of the Lemon test. Legislative prayer has a pre-eminently religious purpose and a primarily religious effect, and it fosters excessive entanglement between government and religion.

As Justice Brennan recognized in his dissenting opinion, the practice of legislative prayer violates the most basic purposes and principles underlying the Establishment Clause.[65] The Establishment Clause guarantees the individual's right to religious conscience by prohibiting the government from requiring individuals to support, with tax dollars, the practice or expression of a faith with which they do not agree. It also prohibits the state from interfering in the essential autonomy of religious life by eliminating situations in which the government can dictate the content of prayers. It prevents the trivialization and degradation of religion that could develop from too close an attachment to the government. And finally, it ensures that religious issues do not become the occasion for battle in the political arena.[66] Legislative prayer conflicts with each of those aims, but the Court approved the practice by ignoring Lemon -- just as it had ignored Sherbert in the "special" cases presented by O'Lone, Goldman, and Roy.

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[64] Id. at 786-88.

[65] Id. at 796.

The Court did return to the Lemon test in Lynch v. Donnelly.[67] But as Justice Brennan observed, the Court's "less-than-vigorous application of the Lemon test suggests that its commitment to those standards may only be superficial."[68] In Lynch, the Court upheld Pawtucket, Rhode Island's practice of including a nativity scene in its Christmas display. The majority concluded that celebrating Christmas and depicting the origins of Christmas with a nativity scene were legitimate secular purposes,[69] that "display of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmentally supported museums,"[70] and that political divisiveness engendered and evidenced solely by a lawsuit challenging the display was not evidence of excessive entanglement.[71]

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[66] Id. at 803-05 (Brennan, J., dissenting).

[67] 465 U.S. 670 (1984).

[68] Id. at 696 (Brennan, J., dissenting).

[69] Id. at 681.

[70] Id. at 683.

The Court rejected the argument that all of the legitimate secular purposes of celebrating Christmas could be achieved without including the nativity scene, which was directly linked to the religious aspects of the holiday.[72] The Court also denied that the primary effect of including a nativity scene in the city's display was "to place the government's imprimatur of approval on the particular religious beliefs exemplified by the crèche," and that the message conveyed to minority religious groups was "that their views are not similarly worthy of public recognition nor entitled to public support."[73]

In a dissenting opinion, Justice Blackmun addressed the dangers of allowing the Lemon test to be so weakened, noting that "the majority does an injustice to the crèche and the message it manifests."[74] By linking the crèche to the secular and commercial aspects of Christmas, the religious meaning of the crèche and the religious aspects of the holiday were trivialized.[75] As Justice Blackmun realized, without Lemon to give shape to the Establishment Clause, neither government nor religion will receive the protection the Clause was meant to provide to both.

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[71] Id. at 684-85.

[72] See id. at 699 (Brennan, J., dissenting).

[73] See id. at 701 (Brennan, J., dissenting).

[74] Id. at 726.

[75] Id. at 727.

Lemon was not yet dead, however. In Wallace v. Jaffree,[76] the Court relied on the first prong of the Lemon test to invalidate an Alabama statute authorizing teachers to establish a period of silence during each school day "for meditation or voluntary prayer." Alabama already had a statute that authorized a period of silence for meditation, which had been amended by the state legislature to add the words "or voluntary prayer."

In a dissenting opinion in Wallace, Justice Rehnquist attacked Lemon with new vigor. He argued that "[t]he Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing non-discriminatory aid to religion."[77] He criticized the purpose and effect prongs of the Lemon test, and suggested that the entanglement prong should only be applied in certain special situations.[78] In Justice Rehnquist's view, the extent of the Establishment Clause was only to forbid the national government or any state government from actually designating any church as an official one, or from preferring one religious denomination over others.[79]

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[76] 472 U.S. 38 (1985).

[77] Id. at 106.

[78] Id. at 108-110.

Despite the growing frequency and intensity of the attacks on Lemon, the Court again applied the test to invalidate a Louisiana law that forbade the teaching of the theory of evolution in public schools unless accompanied by instruction in creation science.[80] However, the newly-appointed Justice Scalia dissented from the majority's opinion, adding his voice to the growing calls to do away with Lemon. Justice Scalia argued that the purpose prong of the Lemon test had no basis in the history of the First Amendment, and that given the difficulty in determining legislative purpose, the test should be abandoned.[81]

The Court dealt Lemon and general Establishment Clause values a further blow when, in Bowen v. Kendrick,[82] it upheld the Adolescent Family Life Act (AFLA), a federal program that grants funds to organizations, including religious organizations, to help teenagers prevent or cope with pregnancy. Although none of the justices wrote opinions advocating doing away with Lemon, the Court applied Lemon in such a weakened manner as to approve a law that almost certainly would have been invalidated had it been reviewed by the Court before 1981.

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[79] Id. at 113.

[80] Edwards v. Aguillard, 482 U.S. 578 (1987).

[81] Id. at 639. Justice Scalia's opposition to the use of legislative history in this context is in accord with his general position on the appropriate role of such material. See, e.g., Green v. Bock Laundry Machine Co., 109 S. Ct. 1981, 1994-95 (1989) (Scalia, J., concurring).

[82] 108 S. Ct. 2562 (1988).

Writing for a narrow majority, in which Justice Kennedy provided the crucial fifth vote, Chief Justice Rehnquist concluded that allowing religious institutions to receive federal funds under the program did not have the primary effect of advancing religion, because a fairly wide spectrum of organizations could apply for and receive funding under the Act.[83] Chief Justice Rehnquist also refused to acknowledge that government review and monitoring of the programs set up and run by AFLA grantees would constitute excessive entanglement in violation of the third prong of the Lemon test. In effect, he refused to apply the entanglement analysis because, as he saw it, programs giving aid to religious institutions would face an intolerable "Catch-22": If the government did not monitor the organization, there was a risk the funds would be used for impermissible purposes; but if the government did monitor the organization, excessive entanglement problems arose.[84]

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[83] Id. at 2572-73.

[84] Id. at 2576. In a separate "as applied" inquiry, the majority found the record to be incomplete, and remanded to the District Court for findings on whether aid was flowing to pervasively sectarian religious institutions, and whether aid was being used to fund specifically religious activities in otherwise substantially secular settings. Id. at 2580-81.

The dissent criticized the majority's approval of a statute that supplied government funding for materials that propounded religious views. The dissent quoted from an AFLA-funded pamphlet that stated that "[t]he Church has always said that the marriage act, or intercourse, seals the union of husband and wife . . . . Christ commits himself to us when we come to ask for the sacrament of marriage."[85] In addition to concluding that AFLA impermissibly advanced religion by funding that type of dogma, the dissent noted that AFLA fostered excessive entanglement.[86] The dissent argued that the "Catch-22" complained of by the majority was not a reason for ignoring the entanglement inherent in preventing funds from going to sectarian uses in this program -- rather it was an indication that the program was unconstitutional.[87]

In Kendrick, the Court in effect abandoned the "wall of separation" between church and state, without admitting to any change in analysis. By allowing government funding of religious organizations for purposes inextricably linked to religious doctrine, the Court was saying that it was willing to risk the real possibility that government funds would be used to promote religious messages. The Court also was in effect allowing government grant administrators to pick and choose between various religious messages, funding only those it preferred.[88] Although Lemon was not overruled or even criticized in Kendrick, the damage was palpable.

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[85] Id. at 2583 (quoting record).

[86] Id. at 2595.

[87] Id.

The Court returned to the debate over the future of Lemon in County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter.[89] Justice Kennedy concurred with the majority's decision that a display of a menorah along with a Christmas tree and a sign saying "Salute to Liberty" was constitutional, but dissented from the decision that a crèche could not be displayed on its own inside a county courthouse. Invoking Marsh, and applying it far beyond its special context, Justice Kennedy reasoned that if legislative prayer did not violate the Establishment Clause, then the display of a menorah or a crèche was certainly constitutional.[90]

Since the Court decided Allegheny, President Bush has replaced Justices Brennan and Marshall, two of the Court's most consistent advocates of a vigorous Establishment Clause jurisprudence, with Justices Souter and Thomas, whose views on this issue are largely unknown. However, they will likely be heard from soon. In an Establishment Clause case pending before the Supreme Court, Lee v. Weisman, the United States submitted a brief as amicus curiae in which it suggested that the Supreme Court "replace the Lemon test"[91] with a test that considers only whether there is any government "coercion" to participate in or refrain from participating in a religious activity.[92] Lee, which involves a challenge to a Providence, Rhode Island, public school's practice of having local members of the clergy deliver invocations at graduation ceremonies, may administer the final blow to the Lemon pillar of Establishment Clause jurisprudence.

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[88] Cf. Rust v. Sullivan, 111 S. Ct. 1759 (1991) (Department of Health and Human Services can forbid federal family planning grant recipients from offering counseling or referrals for abortion services).

[89] 109 S. Ct. 3086 (1989).

[90] Id.

In Lee, the Administration argues that "coercion" should be the touchstone of Establishment Clause analysis, despite the Court's recognition in Nyquist that "the absence of any element of coercion . . . is irrelevant to questions arising under the Establishment Clause."[93] The Court has previously rejected arguments that an absence of coercion was sufficient to approve government action under the Establishment Clause, because "[a]n Establishment Clause standard that prohibits only 'coercive' practices or overt efforts at government proselytization, but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not . . . adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community."[94]

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[91] United States Brief at 6.

[92] U.S. Brief at 24-25.

[93] 413 U.S. at 786.

Under the proposed coercion standard, many seemingly well-settled Establishment Clause principles could be overturned. For example, "voluntary" prayer in public schools, as well as laws requiring the teaching of creationism, would be likely to be approved. Similarly, the use of government funds to support parochial schools and churches or other religious institutions might well be allowed.

Even if the Court should reject the minimalist coercion standard advocated by the Bush Administration, the past decade of attacks on Lemon already has taken its toll on Establishment Clause rights, as reflected in numerous recent lower court decisions. For example, in Van Zandt v. Thompson,[95] the Seventh Circuit held that the Illinois House of Representatives did not violate the Establishment Clause when it decided to convert a hearing room in the public State Capitol Building into a prayer room "where its members may seek God, the comfort of His presence, the light of His guidance, and the strength of His love."[96] The Ninth Circuit reached a similar decision regarding Hawaii's celebration of Good Friday as a state holiday.[97] That these inherently religious actions, endorsing prayer and commemorating the death of Jesus Christ, could be found to have secular purposes and secular effects, shows how weakened the Lemon test has become, and how close state governments can come to "establishing" a religion without judicial interference.

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[94] Allegheny, 109 S. Ct. at 3119 (O'Connor, J., concurring).

[95] 839 F.2d 1215 (7th Cir. 1988).

[96] Id. at 1221-23 (quoting Illinois House Resolution 408).

The weakening of Establishment Clause jurisprudence has also given religion a larger role in governmental decision-making, impairing individual rights. For example, in Clayton v. State,[98] the Eighth Circuit rejected an Establishment Clause challenge to a religiously-motivated prohibition on dancing in a Missouri school district. Despite the trial court's findings that the purpose of the law was to put the weight of the government behind a religious objection to dancing, that the primary effect of the rule was to endorse the tenets of those religious groups who believe that dancing is sinful, and that the political divisiveness of the rule raised excessive entanglement concerns, the Court of Appeals held that each of the three prongs of the Lemon test was satisfied.[99]

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[97] Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991), petition for cert. filed, 60 U.S.L.W. 3406 (U.S. Nov. 12, 1991) (No. 91-796).

[98] 884 F.2d 376 (8th Cir. 1989), cert. denied, 110 S. Ct. 1811 (1990).

[99] Id. at 379.

Religious institutions also are receiving a larger share of public funds. For example, in Pulido v. Cavazos,[100] the Eighth Circuit held that providing remedial education services to parochial school children in portable classrooms located on parochial school property did not violate the Establishment Clause, even if more money was being spent on parochial school students than was being spent on similar services for public school students.

Although legislative remedies may help moderate encroachments on free exercise rights, it will be much more difficult to protect Establishment Clause values once the Supreme Court abandons the field. It is one thing to persuade the majority not to infringe on minority religious rights directly; it is another thing to convince a majority not to promote its own religion in government practices. As society becomes increasingly atomized, people may well be tempted to turn to official religion as an expression of unity. Moreover, as government increasingly is seen as unable to perform any worthy function, embracing religion may well seem politically attractive to our elected officials -- their salvation from an angry electorate. The Court, insensitive to the values underlying the religion clauses, may well permit the embrace.

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[100] 934 F.2d 912 (8th Cir. 1991).